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No. 92-357-ATX Status: GRANTED Title: Ruth O. Shaw, et al., Appellants

v.

Janet Reno, Attorney General, et al.

Docketed: August 25, 1992 Court: United States District Court for the Eastern District of North Carolina

Counsel for appellant: Everett, Robinson O.

Counsel for appellee: Solicitor General, Speas Jr., Edwin M., Wertz, Rebecca J., Currin, Margaret Person, Powell, H. Jefferson

Notice of appeal filed 5-27-92. 7-2-92 ext til 8-25-92, C.J. Rhenquist - CITED. 10 copies of lodging filed 8-25-92.

Entr	У	Date	e 1	Not	te Proceedings and Orders
1	Jul	2	1992	G	Application (A92-12) to extend the time to file a jurisdictional statement on appeal from July 26, 1992 to September 24, 1992, submitted to The Chief Justice.
2	Jul	2	1992		Application (A92-12) granted by the Chief Justice extending the time to file until August 25, 1992.
3	Aug	25	1992	G	Statement as to jurisdiction filed.
5			1992		Order extending time to file response to jurisdictional statement until October 28, 1992.
6	Sep	28	1992		Brief of appellee North Carolina in opposition filed.
7	Oct	7	1992		DISTRIBUTED. October 30, 1992
8	Oct	28	1992	X	Motion of appellees William Barr, et al. to affirm filed.
9	Nov	4	1992		REDISTRIBUTED. November 25, 1992
10	Nov	9	1992	X	Reply brief of appellants filed.
12			1992		REDISTRIBUTED. December 4, 1992
13	Dec	7	1992		PROBABLE JURISDICTION NOTED. Argument shall be limited to the following question, which all parties are directed to brief: "Whether a state legislature's intent
					to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own."
14			1992		appendix filed.
15	Dec	29	1992		Record filed.
				*	Certified proceedings United Sates District Court for the Eastern District of North Carolina.
16	Jan	11	1993		Motion of appellants to dispense with printing the joint appendix GRANTED.
17			1993		Brief amicus curiae of American Jewish Congress filed.
			1993		Brief of appellants Ruth O. Shaw, et al. filed.
19	Jan	21	1993		Brief amicus curiae of Republican National Committee filed.
20	Jan	21	1993		Brief amici curiae of Washington Legal Foundation, et al. filed.

Entry		Date		Not	e Proceedings and Orders
21	Jan	21	1993		LODGING by petitioner. Ten copies of Jurisdiction Statement in Pope v. Blue; 1990 North Carolina Census; and maps of North Carolina Congressional Districts.
22	Feb	->9	1993	G	Motion of the Acting Solicitor General for divided argument filed.
23	Feb	22	1993		Motion of the Acting Solicitor General for divided argument GRANTED.
24	Feb	22	1993		Brief amici curiae of Democratic National Committee, et al. filed.
25	Feb	23	1993		Brief of appellees Stuart M. Gerson, Acting Attorney General, et al. filed.
26	Feb	24	1993		Brief of appellee North Carolina filed.
27	Feb	24	1993		Brief amici curiae of Lawyer's Committee for Civil Rights Under Law, et al. filed.
28	Feb	24	1993		Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
29	Feb	24	1993		Brief amici curiae of Bolley Johnson, et al. filed.
30	Mar	4	1993		CIRCULATED.
31	Mar	5	1993		SET FOR ARGUMENT TUESDAY, APRIL 20, 1993. (1ST CASE).
32	Mar	22	1993	X	Supplemental brief of appellee North Carolina filed.
33	Mar	29	1993	X	Reply brief of appellants. filed.
34	Apr	20	1993		ARGUED.

# 92-357

No.

FILED
AUG 2 5 1992

OFFICE OF THE CLERK

IN THE

#### SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Apellants,

V.

WILLIAM BARR, et al.,

Appellees.

FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

#### JURISDICTIONAL STATEMENT

Robinson O. Everett Counsel of Record 300 FUNB Building 301 West Main Street Durham, N. C. 27702 (919) 682-5691

Jeffrey B. Parsons
Everett, Gaskins, Hancock &
Stevens
127 West Hargett Street
Raleigh, N. C. 27602
(919) 755-0025

11-7

Counsel for Appellants

#### QUESTIONS PRESENTED

I.

ARTICLE I SECTION 2 AND THE FOURTEENTH AND FIFTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY CREATING TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS FOR THE PURPOSE OF ASSURING THE ELECTION OF MINORITY PERSONS FROM THESE DISTRICTS TO THE UNITED STATES HOUSE OF REPRESENTATIVES?

II.

UNITED JEWISH ORGANIZATIONS, INC. V.

CAREY, 430 U.S. 144 (1977) AUTHORIZED THE

NORTH CAROLINA LEGISLATURE TO CREATE TWO

MAJORITY-MINORITY CONGRESSIONAL DISTRICTS

FOR A RACIALLY CONSCIOUS PURPOSE?

III.

DID THE NORTH CAROLINA STATE LEGISLATURE
HAVE A RACIALLY DISCRIMINATORY OR
INVIDIOUS PURPOSE WHEN IT CREATED TWO
MAJORITY-MINORITY CONGRESSIONAL DISTRICTS
AT THE INSISTENCE OF THE FEDERAL
DEFENDANTS?

IV.

DID THE ATTORNEY GENERAL MISINTERPRET AND MISAPPLY THE VOTING RIGHTS ACT, 42 U.S.C. § 1973, IN REQUIRING THAT NORTH CAROLINA CREATE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS?

V.

DO WHITE VOTERS HAVE STANDING TO SEEK RELIEF FROM CONGRESSIONAL REDISTRICTING WHICH WAS INTENDED BY BOTH THE STATE AND FEDERAL DEFENDANTS TO RESULT IN THE ELECTION OF MINORITY PERSONS TO CONGRESS FROM TWO MAJORITY-MINORITY DISTRICTS?

VI.

WERE THE APPELLANTS ENTITLED TO SUE THE FEDERAL DEFENDANTS WHO HAD INITIATED THE CREATION OF THE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS IN NORTH CAROLINA?

#### THE PARTIES

Appellants, Plaintiffs in the action below, are as follows:
Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, and Dorothy Bullock.

Appellees, Defendants in the action below, are as follows:

William Barr, in his official capacity as Attorney General of the United States; John Dunne, in his official capacity as Assistant Attorney General of the United States, in charge of the Civil Rights Division; James G. Martin, in his official capacity as Governor of the State of North Carolina; James Gardner, in his official capacity as Lieutenant Governor of the State of North Carolina, and President of the Senate; Daniel T. Blue, Jr., in his

official capacity as Speaker of the North Carolina House of Representatives; Rufus L. Edmisten, in his official capacity of Secretary of the State of North Carolina; The North Carolina State Board of Elections, an official agency of the State of North Carolina; M.H. Hood Ellis, in his official capacity as Chairman of the North Carolina State Board of Elections; Gregg O. Allen, William A. Marsh, Jr., Ruth Turner, and June K. Youngblood, in their official capacities as members of the North Carolina State Board of Elections.

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#### IN THE

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1992

No.	

RUTH O. SHAW, et al.,

Appellants,

v.

WILLIAM BARR, et al.,

Appellees.

APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

### JURISDICTIONAL STATEMENT

In this Congressional redistricting case, Appellants appeal from the final judgment of the United States District Court for the Eastern District of North Carolina, sitting as a three-judge Court pursuant to 28 U.S.C. § 2284, which, by

divided opinion, dismissed Appellants' Complaint. As to the Appellees, Barr and "Federal (hereinafter the Dunne Defendants") the Court dismissed for both lack of subject matter jurisdiction and for failure to state a claim for relief. remaining Defendants the As (hereinafter the "State Defendants"), dismissal was for failure to state a claim.

of the Defendants on race in the Congressional redistricting of North Carolina violated several provisions of the United States Constitution and was neither required nor authorized by the Voting Rights Act. Attorney General Barr, his subordinates, and the State

Defendants were all participants in creating for North Carolina a system of proportional representation in Congress based on race. This attempt has resulted in two majority-minority Congressional districts of "bizarre" shapes which have invited ridicule as "political pornography" have prompted and also attacks on grounds of partisan gerrymandering and irrationality.2 Appellants respectfully submit that this jurisdictional statement presents questions so substantial -- and so basic for our system of government -- as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

See concurring and dissenting opinion of Judge Voorhees in the Court below (App. A at p. 26a).

<sup>&</sup>lt;sup>2</sup> See <u>Pope v. Blue</u>, No. 3:92 CV 71-P (W.D.N.C. Apr. 16, 1992), (three-judge court), appeal filed June 19, 1992 (No. 91-2038).

#### OPINIONS BELOW

The April 27, 1992 Order of the three-judge Court and the Opinion filed on August 7, 1992, have not yet been officially reported, but are set out in the accompanying Appendix A. The concurring and dissenting Opinion of Judge Voorhees is also attached thereto.

#### JURISDICTION

Appellants' Complaint in the Court below sought preliminary and permanent injunctive relief against enforcement of North Carolina's congressional redistricting statute, pursuant to 28 U.S.C. \$\$ 1331, 1343(3) and (4), 1361, and 2284, and 42 U.S.C. \$\$ 1983 and 1988; and, as amended, the Complaint also asked for declaratory relief pursuant to 28 U.S.C. \$ 2201. A three-judge Court was convened pursuant to 28 U.S.C. \$ 2284(a); and on April 27, 1992, the Court granted

the Motion to Dismiss filed by the Federal and State Defendants. A final Notice of Appeal was filed on May 27, 1992. Subsequently, the Chief Justice extended until August 25, 1992, the time for filing this appeal. Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. § 1253.

# AND STATUTES INVOLVED

This case arises under:

(a) Article I, Section 2 of the Constitution of the United States, which provides in pertinent part:

The House of Representatives shall be composed of members chosen in every second year by the people of the several states; . . . .

(b) Article I, Section 4 of the Constitution of the United States, which provides in pertinent part:

The times, places and manner of holding elections for senators and representatives shall be prescribed

in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

(c) Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;

(d) the Fifteenth Amendment to the constitution of the United States, which provides in pertinent part:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

(e) Title 42, Section 1973b of the United States Code, which provides in pertinent part:

A violation of subsection (a) is

established if, based on the totality of circumstances it is shown that the political processes leading to nomination or election in the state or political subdivision are equally open to participation by members of a class of citizens protected by subsection (a), and that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

# (f) Title 42, \$ 19731(b), which provides in pertinent part:

No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 1973g of this title shall have jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of subchapters I-A to I-C of this chapter or any action of any Federal officer or employee pursuant hereto.

(g) Chapter 7 of the 1992 Extra Session Laws of North Carolina (hereinafter "Chapter 7"), the challenged congressional redistricting statute, which amends the North Carolina Elections Code, Chapter 163, Article 17 of the North Carolina General Statutes. Ten copies of Chapter 7 have been lodged with the Clerk of this Court and copies of this legislation and of maps reflecting the congressional districts created by Chapter 7 contained in Appendices to the jurisdictional statement filed by the appellants with this Court on June 19, 1992, in Pope v. Blue, (Docket No. 91-2038)

### STATEMENT OF THE CASE

On March 12, 1992, Appellants, who are all registered voters in North Carolina, brought this action against William Barr, in his official capacity as

Attorney General, Civil Rights Division (the "Federal Defendants") and against various North Carolina State officials and agencies (the "State Defendants") to challenge on constitutional and statutory grounds the Congressional redistricting plans adopted by the State of North Carolina.

The Complaint, as amended, alleges that, as a result of substantial population increases recorded in the 1990 decennial census, North Carolina gained an additional seat in the United States House of Representatives; and this increase from necessitated twelve eleven to Congressional redistricting, subject to the requirements of the Constitution of the United States, 2 U.S.C. § 2, and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. Accordingly, on July 9, 1991, the General

Assembly of North Carolina enacted legislation to redistrict the State into twelve Congressional districts.<sup>3</sup>

Because forty of North Carolina's one hundred counties are subject to the preclearance provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, the redistricting legislation could not take effect until the State either obtained preclearance from the Attorney General or secured a favorable declaratory judgment in the United States District Court for the District of Columbia. When the State sought preclearance from the Attorney General, he objected to the 1991 Congressional redistricting legislation because it had created only one majorityminority district.

In response to the Attorney General's objection, the General Assembly made a second effort and early in 1992 enacted Chapter 7 of the North Carolina Extra Session Laws, which created two majorityminority Congressional districts. the First District, is in the eastern section of North Carolina extending from the Virginia State line southward to the South Carolina State line; and it "looks like a Rorschach ink-blot test." Opinion of Judge Voorhees, Appendix A at The other majority-minority 37a ·) district, the Twelfth, is "a thin band, sometimes no wider than Interstate Highway long, snaking 160 miles 85. some diagonally across Piedmont North Carolina from Durham to Gastonia". (See Opinion of Judge Phillips, App. A at 4-5a ). Two of the Appellants reside in this District, which "slinks down the Interstate Highway

<sup>&</sup>lt;sup>3</sup> Chapter 601 of the North Carolina Session Laws of 1991.

85 until it gobbles in enough enclaves of black neighborhoods to satisfy a predetermined percentage of minority voters." (Opinion of Judge Voorhees, App. A at 37a).

This redistricting, under which "many precincts, counties, and towns in North Carolina are divided among two or even three Congressional districts", (see Opinion of Judge Phillips, App. A at 5a ), invites attack on several grounds, see Pope v. Blue, supra n.2; but Appellants' Complaint targets the racial gerrymandering which underlies the redistricting.4 The premise of the

Complaint is that the Constitution does not permit a State legislature, the Congress, or even both acting together, to proportional of system create representation by race in the United States House of Representatives.5 Complaint alleges that, in requiring the North Carolina legislature to create two majority-minority districts, the Federal Defendants violated Article I, Sections 2 and 4; Article IV, Section 2; and the Fifth and Fifteenth Amendments of the Constitution. The actions of the State Defendants in creating the two majorityminority Congressional districts are alleged to have violated Article I, Sections 2 and 4, and the Fourteenth and Fifteenth Amendments. The Complaint, as amended, asks for both injunctive and

The term "gerrymander" was coined when, at the insistence of Eldridge Gerry, then Governor of Massachusetts, at least one Congressional district was drawn in 1812 in the shape of a salamander. The North Carolina Congressional redistricting has been labeled "political pornography". (See article cited in Judge Voorhees' Opinion. (App. A at 56a).

North Carolina's population is 76% white; 22% black; and 2% other.

declaratory relief.

The State Defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim for relief. Subsequently the Federal Defendants moved to dismiss for failure to state a claim for relief and under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. On April 27, 1992, a three-judge panel of the United States District Court convened pursuant to 28 U.S.C. § 2284, heard oral argument, and then entered an Order granting the motions of all Defendants. On May 27, 1992, a timely Notice of Appeal was filed; and an order was entered extending appellants' time to file their appeal with this Court.

On August 7, 1992, a majority Opinion was filed in the District Court and a concurring and dissenting Opinion was

filed by Judge Voorhees. (Appendix A). These opinions and the jurisdictional statement and exhibits filed in this Court in <a href="Pope v. Blue">Pope v. Blue</a>, <a href="supra">supra</a>, <a href="note">note</a> 2, <a href="provide">provide</a> extensive factual background for this appeal.

# THE QUESTIONS PRESENTED ARE SUBSTANTIAL INTRODUCTION

 have been insisted upon by the Attorney General under his interpretation of the Voting Rights Act and which State legislatures have created with varying degrees of willingness, threaten the concept that our "Constitution is colorblind." See Plessy v. Ferguson, 163 U.S. 537, 555, 559 (1896) (Harlan, J., dissenting) (Civil War amendments "removed the race line from our governmental cf. Brown v. Board of systems"); Education, 347 U.S. 483 (1954). They repudiate this Court's efforts to eliminate race as a basis for political, economic classification. social, or Moreover, the shackles imposed on our political system by these majorityminority districts in North Carolina and elsewhere will remain in place until the next decade -- indeed, the next century and millenium -- unless removed now by

this Court.

The reliance of the Court below upon United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) (hereinafter U.J.O.) -- where no majority opinion was filed -- makes clear the need for this Court to answer the questions posed here as to that decision's continuing viability and the meaning of terms like "racially discriminatory purpose" and "invidious intent". The lower Court's rejection of Appellants' standing is so inconsistent with this Court's treatment of standing in Powers v. Ohio, 499 U.S. \_\_\_\_, 111 S.Ct. 1364 (1991) as to raise a substantial -and important -- question.

In view of the great power given the Attorney General by the Voting Rights Act, as amended, it also is imperative for this Court to answer the questions whether that official's insistence on achievement of

racially proportionate representation by means of majority-minority districts is based on a misreading of 42 U.S.C. § 1973 and whether individual voters may obtain judicial relief against the Attorney General for his misguided, but successful, effort to impose an unconstitutional requirement on State legislatures in North Carolina and elsewhere.

I.

DID THE NORTH CAROLINA LEGISLATURE VIOLATE ARTICLE I, SECTION 2, AND THE FOURTEENTH AND FIFTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY CREATING TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS FOR THE PURPOSE OF ASSURING THE ELECTION OF MINORITY PERSONS FROM THESE DISTRICTS TO SERVE IN THE UNITED STATES HOUSE OF REPRESENTATIVES?

Article I, Section 2 provides that:

"The House of Representatives shall be composed of Members chosen every second year by the People of the several States.

. . . " Appellants submit that in this context -- just as in the Preamble to the

Constitution -- "the People" is a unifying concept and allows no leeway for racial classification of voters.6 Admittedly, as the Court below emphasized, Article I, Section 2 has been relied on heretofore almost exclusively as a justification for strict enforcement of the "one person, one vote" standard in Congressional redistricting (App. A at 15a); cf. Wesberry v. Sanders, 376 U.S. 1 (1964). Moreover, the lower courts have refused to treat Article I, Section 2 as a safeguard against political gerrymandering. so, appellants submit that a substantial

<sup>&</sup>lt;sup>6</sup> Appellants submit that the words "the People", as used in Article I, section 2 and in the Preamble have a significance akin to that of those same words as used in Lincoln's Gettysburg Address or of "one nation" in the Pledge of Allegiance. Such language is at odds with the apartheid imposed by majority-minority congressional districts.

question remains as to whether Article I,
Section 2 -- as modified by Section 2 of
the Fourteenth Amendment to eliminate an
earlier implicit racial classification -permits racial gerrymandering to achieve
proportional representation by race in the
House of Representatives.'

Appellants find support for their interpretation of Article I, Section 2 -- and of the Fourteenth and Fifteenth Amendments -- in the language of Judge Eisele writing for the majority in Turner v. Arkansas, 784 F.Supp. 553 (E.D. Ark. 1991), aff'd \_\_\_ U.S. \_\_\_, 112 S.Ct. 2296 (No. 91-1615) (June 1, 1992). As he pointed out,

The idea that race or ethnicity, or

language, or religion might become the basis for distributing voters during the periodic redistricting process runs counter to our professed belief in the 'oneness' of American political life and to the belief in Democracy itself with its emphasis on the individual citizen.

(Id. at 562)

Contrary to the view of the court below (App. A at 14-15a), Article I, Section 4 is relevant to Appellants' claims because this Constitutional

Appellants also question whether Congressional elections based on racial classifications conform to the constitutional guarantee of a "Republican Form of Government", Art. IV, § 4.

Judge Eisele also explained that ". . . ethnic boundaries by diminishing the citizenship, sense of common 'ultimately smother democratic choice and threaten democratic institutions', Id. at 560 (quoting Abigail Thernstrom and Don Horowitz) . . . "There is no coherent political philosophy, political principle or political program subsumed under such group labels as 'black citizens', 'white citizens', 'Asian citizens', or 'Hispanic citizens'. Historically, we Americans have opted to pursue the ideal of equal political opportunity for each individual citizen. The standard is 'one person, one vote'. When we speak in terms of 'group political rights' for such categories of voters we are immediately in deep water, for so much of real political significance may be hidden under such group labels." Id. at 562.

provision, along with the Fifteenth Amendment, defines the power of Congress in prescribing how Congressional elections shall be conducted. Appellants submit that this power of Congress is not so broad as to permit Congress to enact legislation which provides for racial quotas or proportionate representation in Congressional redistricting. Because the Federal Defendants have construed the Voting Rights Act to require the creation Congressional majority-minority of districts for the purpose of electing minority persons from these districts -and thereby initiated the creation of North Carolina's "bizarre" redistricting plan -- it is important for this Court to answer now whether Article I, Section 4 Fifteenth Amendment empower permit require or Congress to Congressional redistricting along racial

lines.

The Fifteenth Amendment protects the right to vote against denial or abridgement by either State or Federal officials "on account of race, color, or previous condition of servitude". Racial gerrymandering violates this Amendment. G2omillion v. Lightfoot, 364 U.S. 339, 346 (1960).Appellants submit that, therefore, a substantial question is raised as to how North Carolina's creation of "grotesque" majority-minority Congressional districts can escape this constitutional prohibition.

The lower Court considered that the Constitutional issues raised by Appellants should be approached in terms of Fourteenth Amendment equal protection guarantees. (App. A at 16a). From

The Fifth Amendment's due process clause, which applies to the Federal Defendants, contains an equal protection

this standpoint the outcome seems equally clear. Not only did this Court in 1954 unanimously disavow the drawing of racial lines in education, Brown v. Board of Education, supra; but also it applied thereafter in other fields Justice Harlan's concept of a "color-blind" Constitution, See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Reconstruction statute precluded racebased refusals to sell or lease real estate); Runyon v. McCrary, 427 U.S. 160 (1976) (race-based refusals to contract prohibited); McDonald v. Santa Fe Travel Transportation Co., 427 U.S. 273, 295 (1976) (42 U.S.C. § 1981 prohibits racial discrimination against whites in terminating employment); Anderson v.

Martin, 375 U.S. 399 (1964) (statute invalid which provided for description of candidate's race on ballot); Reitman v. Mulkey, 387 U.S. 369 (1967) (overturning California constitutional provision allowing property owner to consider race of buyer or lessee); and other cases discussed in William Van Alstyne, Rites of Passage: Race, the Supreme Court and the Constitution, 46 U. Ch. L. Rev. 775 (1979).

The distaste for racial classifications is also reflected in recent decisions of this court. For example, race may not be used in peremptorily challenging potential jurors.

cf. Powers v. Ohio, 499 U.S. \_\_\_\_, 111
S.Ct. 1364 (1991); a plan for racial setasides of municipal contracts must receive "strict scrutiny" to determine if there is identified past discrimination which

component. cf. Bolling v. Sharpe, 347 U.S. 497 (1954).

justifies the race-based relief, Richmond v. J.A. Croson Co, 488 U.S. 469 (1989); and, in remedying unconstitutional school segregation, racial balance is not to be achieved for its own sake but is to be pursued only when racial imbalance is caused by past constitutional violations, Freeman v. Pitts, \_\_\_\_\_, U.S. \_\_\_\_\_, 112 S.Ct. 1430, 1447. (1992).

In light of these precedents, a substantial question is presented as to the constitutionality of a Congressional redistricting plan which, without any "strict scrutiny" or any demonstration that an abuse exists to be remedied, 10

II.

DID THE COURT BELOW ERR IN HOLDING THAT UNITED JEWISH ORGANIZATIONS, INC. V. CAREY, 430 U.S. 144 (1977) AUTHORIZED THE NORTH CAROLINA LEGISLATURE TO CREATE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS FOR A RACIALLY CONSCIOUS PURPOSE?

<sup>10</sup> Appellants are unaware of evidence presented by anyone that heretofore race has played any role in the drawing of Carolina's North boundaries for So far as congressional districts. shape Appellants know, the congressional districts in North Carolina has not been a cause for the absence of any black person from North Carolina in Minorities in North the Congress. Carolina simply are not geographically

compact enough to give them a majority in any congressional district with boundaries delineated by use of sound districting principles, such as "compactness". Cf. Thornburg v. Gingles, 478 U.S. 30, 46-7, 49 n.17 (1986). In 1966 North Carolina was judicially directed to create "compact" and "contiguous" Congressional districts. Drum v. Seawell, 249 F.Supp. 877 (M.D.N.C.) (1966), aff'd 383 U.S. 831 (1966); and so far as Appellants are aware, the State complied with those requirements until 1991, when the Federal Defendants intervened.

The Court below reasoned that United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (hereinafter U.J.O.) permitted North Carolina legislature to the redistrict with a racially conscious purpose so long as it sought "to meet the broad remedial requirements of the Voting Rights Act". (App. A at 19a)11 proposition seems suspect on its face. Certainly there is a substantial question as to why a State legislature may engage in blatant gerrymandering -- racial or otherwise -- merely because it believes that, in doing so, it is carrying out the intent of Congress or the will of the Attorney General.

The lower Court's reliance on <u>U.J.O.</u>
to uphold this "Nuremberg defense" is even
more questionable because only a

plurality opinion was rendered in that case; the decision preceded the 1982 amendment of the Voting Rights Act and concerned state legislative districts, rather than Congressional districts; and there was evidence of an abuse that needed remedy. In announcing the plurality's opinion in U.J.O., Justice White stated:

we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be the majority.

(430 U.S. at 168) (emphasis added)
On the other hand, the North Carolina
Legislature rejected "sound districting

In his dissent Judge Voorhees took a more limited view of  $\underline{U.J.O.}$  (App. A at 30a).

<sup>&</sup>quot;One person, one vote" jurisprudence has recognized the difference between Congressional districts and State legislative districts.

principles" -- except for population equality; ignored "residential patterns"; and engaged in "computer-generated political pornography" in order to establish majority-minority congressional districts.

Finally, as Appellants argued in the Court below, <u>U.J.O.</u> is out of step with this Court's more recent jurisprudence. Thus, the Court should answer whether <u>U.J.O.</u> authorizes the use of racial classifications to create majority-minority districts and ensure the election of a quota of minority persons to Congress from North Carolina, even though no "strict scrutiny" has been given to the purported justification for this racial gerrymandering<sup>13</sup> and no indication exists

that heretofore the shape of the State's Congressional districts has had any relation to the failure to elect minority persons to Congress from North Carolina. 14

#### III.

DID THE NORTH CAROLINA STATE LEGISLATURE HAVE A RACIALLY DISCRIMINATORY OR INVIDIOUS PURPOSE WHEN IT CREATED TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS AT THE INSISTENCE OF THE FEDERAL DEFENDANTS?

The State Defendants claim that they lacked a racially discriminatory or

<sup>13</sup> In Quilter v. Voinovich, No. 5:91 CV-2219 (N.D. Ohio) a three-judge Court held that the creation of majority-minority districts was not supported by "the requisite findings". On June 1,

<sup>1992,</sup> this Court noted probable jurisdiction of the appeal sub nom.

Voinovich v. Quilter, U.S., 112

S.Ct. 2299.

North Carolina General Assembly was forced to go in order to create two majority-minority districts demonstrates that the shape of previous Congressional districts had nothing to do with the failure of voters to elect minority persons to Congress.

invidious purpose because they created two majority-minority districts at the insistence of the Federal Defendants. This contention confuses motive with purpose and intent. As Justice Douglas once explained, any state-sponsored preference to one race over another is "invidious". De Funis v. Odegard, 415 U.S. 312, 337, 342, 343-44 (1974) (Douglas, J., dissenting).

No statutory or constitutional right exists for persons of one race to be represented in Congress by persons of the same race. 15 Nonetheless, as alleged in the Complaint, the State Defendants created two majority-minority districts

for the purpose of assuring that two minority persons would be elected to the House of Representatives. Whether such a purpose is "discriminatory" for equal protection purposes is a substantial question that merits an answer from this Court.

#### IV.

DID THE ATTORNEY GENERAL MISINTERPRET AND MISAPPLY THE VOTING RIGHTS ACT, 42 U.S.C. § 1973, IN REQUIRING THAT NORTH CAROLINA CREATE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS?

The Voting Rights Act — on which both the State and Federal Defendants rely — neither requires not authorizes the creation of majority-minority districts.

Indeed, when 42 U.S.C. § 1973 was amended in 1982, Congress added the proviso that this section of the United States Code does not authorize proportional representation. Moreover, Thornburg v. Gingles, 478 U.S. 30, 50 (1986), makes

Rights Act, as amended, minority persons only have a right to participate in the political process, rather than to be represented by persons of their own race. Chisom v. Roemer, 111 S. Ct. 2354 (1991).

clear that the Voting Rights Act does not authorize the creation of majorityminority districts which are "geographically compact". The Federal Defendants continue to press for the creation of majority-minority districts at the expense of compactness; 16 and so the time has come for this Court to answer whether, despite the legislative disclaimer in 42 U.S.C. § 1973, Congress intended to allow the Attorney General to require North Carolina -- or any other state -- to create majority-minority districts and to do so without any "strict scrutiny" and in utter disregard of "sound districting principles" such compactness.

V.

DO WHITE VOTERS HAVE STANDING TO SEEK RELIEF FROM CONGRESSIONAL REDISTRICTING WHICH WAS INTENDED BY BOTH THE STATE AND FEDERAL DEFENDANTS TO RESULT IN THE ELECTION OF MINORITY PERSONS TO CONGRESS FROM TWO MAJORITY-MINORITY DISTRICTS?

reasoned that below The Court Appellants -- all five of whom are white -- lack standing to complain, because the "plan demonstrably will not lead to proportional underrepresentation of white voters on a statewide basis" and because there is "no cognizable constitutional injury if [an Appellant's] particular candidate should lose by virtue of the district's racial composition". (App. A A parallel argument was at 24a). rejected by this Court in Powers v. Ohio, defendant where white supra, successfully challenged a prosecutor's use of peremptory challenges to exclude black jurors.

The Appellants are asserting their

Attorney General need not be treated as infallible in his interpretation of the Voting Rights Act. Presley v. Etowah County Commissioners, U.S. \_\_\_\_, 112 S.Ct. 820 (1992).

constitutional right to vote in a congressional district created in a raceneutral manner, just as the defendant in Powers asserted his right to a raceneutral trial. The circumstance that minority voters have the same right to a rate-neutral electoral process does not destroy Appellants' claim for relief.17 The "cognizable constitutional injury" seems especially clear as to the two Appellants who are registered to vote in the serpentine Twelfth District -- which was created in a manner intended to guarantee that a minority person would be elected therefrom to Congress. In short,

these two white Appellants will be represented in Congress by a black person because the Federal Defendants and the State Defendants unconstitutionally decided this should occur.

Contrary to the rationale of the court below, it is irrelevant that, because of the probable election of white congressional from other candidates "white voters on a districts, the be will not basis" statewide Congress. underrepresented in Furthermore, the two Appellants in the suffer "cognizable District Twelfth constitutional injury" because the State Defendants placed them in a "grotesque" 160-mile long, racially-gerrymandered, congressional district, in which the lack of compactness deprives them of the opportunity for political participation they would possess in a district formed

In <u>Powers</u>, <u>supra</u>, the white defendant did not lose his right to a jury selected in a "race-neutral" manner even though a black defendant would have had the same right. <u>See also McDonald v. Santa Fe Travel Transportation Co.</u>, <u>supra</u>, which held that white employees are entitled to relief from employment termination based on race.

pursuant to the "sound districting principles" mentioned in Justice White's plurality opinion in <u>U.J.O.</u>, 430 U.S. at 168. Thus, due to the drawing of district boundaries along racial lines they have been placed at a disadvantage in participating politically in comparison with voters in other congressional districts, which are more compact. The question whether white voters -- like Appellants -- have standing to complain of racial gerrymandering in redistricting is substantial and merits a definitive answer from this Court.

#### VI.

WERE THE APPELLANTS ENTITLED TO SUE THE FEDERAL DEFENDANTS WHO HAD INITIATED THE CREATION OF THE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS IN NORTH CAROLINA?

The Federal Defendants claim that 42 U.S.C. § 19731(b) precludes any action against them in any Court other than the

District Court for the District of Columbia. Furthermore, according to them, only a State or a governmental subdivision thereof may sue the Federal Defendants in the District Court of the District of Columbia; and so, by their logic, they are totally immune from suit by Appellants or any other individuals whose constitutional rights have been violated at the instance of these Defendants.

Appellants recognize that federal courts may not interfere with the Attorney General's exercise of discretion to determine whether to preclear or not preclear a redistricting plan, Morris v. Gressette, 432 U.S. 491 (1977). However, even this decision recognizes that aggrieved persons may obtain judicial review of final agency action unless there is persuasive reason to believe that Congress intended to prohibit it.

Moreover, private persons remain free after preclearance to attack the constitutionality of redistricting in the traditional manner. Allen v. State Board of Elections, 393 U.S. 544 (1969). With these principles in mind, Appellants submit that the Federal Defendants were properly joined in this suit and should not have been dismissed.

In the first place, the Complaint, as amended, includes a prayer for declaratory relief -- which falls outside the language of 42 U.S.C. § 19731(b). 18 Secondly, the Appellants are not seeking to control the exercise of the Attorney General's discretion, but instead to prevent him from acting outside the scope of his discretion. Third, because of the

Attorney General's preclearance authority, his presence as a Defendant in the case is necessary in order that meaningful relief can be given. Cf. U.J.O., supra, at 153, In short, in the interest of n.13. judicial economy -- and consistent with concepts of pendent jurisdiction19 -- the Federal Defendants should be retained in denying otherwise, by the case; the future for a in preclearance congressional redistricting plan which does not include two majority-minority districts, the Attorney General as a practical matter can prevent Appellants from receiving promptly the relief to

The preclusion of declaratory judgments by § 19731(b) is only for actions under § 1973b or § 1973c and does not apply to Appellants' Complaint.

Elections of North Carolina, Civ. No. 291 CV 002540 (M.D.N.C. March 31, 1992); Weintraub v. Hanrahan, 435 F.2d 461, 463 (7th Cir. 1970). Cf. Fed. R. Civ. P. 19(a).

which they are entitled.<sup>20</sup> This question of the liability of the Attorney General is substantial and calls for a prompt decision by this Court.

### CONCLUSION

The questions posed are substantial and important to the future of the electoral process in the United States. They deserve plenary consideration by this Court after briefs have been submitted and oral argument has taken place.

Respectfully submitted,

Robinson O. Everett Counsel of Record 300 FUNB Building 301 West Main Street Durham, North Carolina 27702 (919) 682-5691

Jeffrey B. Parsons
Everett, Gaskins, Hancock &
Stevens
127 West Hargett Street
Raleigh, North Carolina 27602
(919) 755-0025
Counsel for Appellants

August 25, 1992

The Attorney General's preclearance authority already has been used to cause "cognizable constitutional injury" to appellants, all of whom reside in one of the sixty North Carolina counties not subject to preclearance.

APPENDIX

#### APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

> Civil Action No. 92-202-CIV-5-BR (THREE-JUDGE DISTRICT COURT)

> > RUTH O. SHAW, et al,

Plaintiffs.

V

WILLIAM BARR, et al.,

-Defendants.

Before PHILLIPS, Circuit Judge, BRITT, District Judge\*, and VOORHEES, Chief District Judge\*\*

\*of the Eastern District of North Carolina \*of the Western District of North Carolina

#### FILED

AUG 07 1992

U.S. DISTRICT COURT E. DIST. NO. CAR.

#### MEMORANDUM OPINION

PHILLIPS, Circuit Judge, with whom BRITT, District Judge, joins:

Plaintiffs Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, and Dorothy G. Bullock, all citizens of the State of North Carolina and registered voters in Durham County, brought this action against William

Barr, in his official capacity as Attorney General of the United States, and John Dunne, in his official capacity as Assistant Attorney General of the United States, Civil Rights Division (hereinafter, together, the "federal defendants"), and against various North Carolina state officials and agencies (hereinafter, collectively, the "state defendants"), challenging on constitutional and statutory grounds the congressional redistricting plan adopted by the State of North Carolina. Jurisdiction of this three-judge district court is based on 28 U.S.C. §§ 1331, 1343, and 2284, and 42 U.S.C. §§ 1983 and 1988. The case came before us on motions of both the federal and the state defendants to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state claims against them upon which relief could be granted, and of the federal defendants to dismiss as well under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Following a hearing on the motions, we concluded that they should be granted, announced our decision orally, and entered an order of dismissal on April 27, 1992. Issuance of a written opinion was deferred in view of the imminence of the Democratic and Republican primary elections scheduled for May 5. 1992.

I

As a result of population increases reflected in the 1990 Decennial Census, North Carolina became entitled to a twelfth seat in the United States House of Representatives. Accordingly, on July 9, 1991, the General Assembly of North Carolina enacted legislation to redistrict the state into twelve congressional districts. The redistricting plan as originally enacted included one district, the First District, that had a majority of black persons of voting age, and of black persons registered to vote. This proposed majority-minority district was centered in the northeastern part of the state.

Because 40 of North Carolina's 100 counties are covered by the special provisions of Section 5 of the Voting Rights Act, the General Assembly submitted its redistricting plan for preclearance by the Attorney General of the United States. On December 18, 1991, the Attorney General, by letter of the Assistant Attorney General, Civil Rights Division, interposed formal objection, under Section 5, to the General Assembly's proposed redistricting plan.

Objection was based on the fact that "the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state." Letter of John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991). It appeared, the letter asserted, that the General Assembly "chose not to give effect to black and Native-American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority

In jurisdictions covered by the special provisions of Section 5, any change in voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting may be submitted to the United States District Court for the District of Columbia "for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or

be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.

concentration in this part of the state." Id.2 It was also noted that the General Assembly

was well aware of significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina. For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature. . . . These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons.

Id.

In response to the Attorney General's objection to the proposed redistricting plan, the General Assembly enacted the redistricting legislation at issue here (the "Plan") on January 24, 1992. The Plan creates a second majority-minority district, the Twelfth District, not in the south-central to southeast area of North Carolina, where many had advocated locating a second majority-minority district, but in a thin band, sometimes no wider than Interstate

Highway 85, some 160 miles long, snaking diagonally across piedmont North Carolina from Durham to Gastonia.<sup>3</sup> As a result of the tortured configuration of the Twelfth District and other features of the Plan, many precincts, counties, and towns in North Carolina are divided among two or even three congressional districts. Plaintiffs are residents of an area that was so affected. Before the challenged redistricting, plaintiffs Shaw, Shimm, Robinson Everett, and Bullock, all residents of Durham County, had been registered to vote in the Second District. Under the Plan, Shaw and Shimm will vote in the Twelfth District; Robinson Everett and Bullock will continue to vote in the Second District. Plaintiff James Everett, also a resident of Durham County, registered to vote after the Plan was adopted. He will vote in the Twelfth District.

Plaintiffs then brought this action on March 12, 1992, seeking as end relief a permanent injunction against implementation of the Plan on the ground that it is unconstitutional, and in the interim a preliminary injunction and temporary restraining order enjoining the appropriate state defendants from "taking any action in preparation for primary or general elections for the U. S. House of Representatives." Complaint at 16. Following designation of this three-judge court and upon indications that both the state and federal defendants proposed filing motions to dismiss the claims against them on dispositive legal grounds, a scheduling order was entered to permit hearing of the

<sup>&</sup>lt;sup>2</sup> With regard to the one majority-minority district created in the proposed redistricting plan, it was noted that

<sup>[</sup>t]he unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and, indeed, at least one alternative configuration was available that would have been more compact. Nonetheless, we have concluded that the irregular configuration of that district did not have the purpose or effect of minimizing minority voting strength in that region.

<sup>&</sup>lt;sup>3</sup> In creating the Plan, the Democratically controlled General Assembly rejected plans offered by both Republicans and nonpartisan groups for locating the second majority-minority district in the south-central to southeast part of the state.

The Republican Party of North Carolina and various other plaintiffs lodged a political gerrymandering attack on the Plan, contending primarily that rejection of their proposed plans in favor of that adopted was motivated essentially by an intent to protect Democrat incumbents. That suit recently was dismissed by another three-judge district court. Pope v. Blue, No. 3:92CV71-P (W.D.N.C. Apr. 16, 1992).

motions before the scheduled primary on May 5, 1992. The matter then came on for hearing on April 27, 1992, as scheduled, and was considered by the court on the pleadings, the motions to dismiss with supporting and opposing legal memoranda, and oral argument of the parties. Because of the imminence of the scheduled primary elections on May 5, 1992, we announced orally our decision to grant the motions and entered an order of dismissal on April 27, 1992, deferring issuance of a written opinion. Our reasons for decision follow.

## II

Preliminarily, we note that in entertaining and deciding motions to dismiss on the merits or on subject matter jurisdiction grounds on the basis of bare-bones pleadings, courts are under special obligation to construe the pleadings liberally in favor of the pleader, especially in considering motions to dismiss for failure to state claims under Fed. R. Civ. P. 12(b)(6). See generally 5A C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 1357 (1990) (hereinafter Wright & Miller). Indeed, where any perceived pleading insufficiency relates only to factual matters, dismissal on the merits is ordinarily inappropriate, with leave to amend and deferral of decision to summary judgment or trial on appropriately amended pleadings and discovery materials being the appropriate course. Id. at 360-67. When, however, it is apparent from the pleadings, motions, legal memoranda, matters of public record, and other matters properly within the range of judicial notice, that only legal issues are presented, decision on the merits may be appropriate without the need for further factual development, whether by pleading amendment, discovery, or evidentiary proceedings. This is true even where decision requires analysis of difficult constitutional issues and involves rejection of constitutional claims asserted by the pleader on their basis. See, e.g., United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1976) (constitutional

voting rights claim); Bowers v. Hardwick,478 U.S. 186 (1986) (constitutional "privacy" claim). In considering whether a pleading is thus legally rather than merely factually insufficient, however, a court must in fairness at this early stage inquire whether the allegations could support relief on any legal theory within the range of reason and the ultimate constraints of the adversarial process. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Harrison v. U.S. Postal Service, 840 F.2d 1149, 1152 (4th Cir. 1988).

We have considered the claims here in light of these general principles and the related familiar ones that all purely factual allegations, but not legal conclusions, in the complaint are to be taken as \*rue, etc. 5A Wright & Miller § 1357, at 304-21.

## III

We first address the claim alleged against the federal defendants and challenged by their motions to dismiss on jurisdictional and merits grounds.

The gist of this claim as pleaded is that in first declining to preclear North Carolina's original redistricting plan, which included only one majority-black district, then preclearing the one here under specific attack which has two, Attorney General Barr and Assistant Attorney General Dunne made an "unconstitutional interpretation and application of the Voting Rights Act." Complaint at 2. This unconstitutional action by the federal defendants is then alleged to have "coerce[d] the [state] defendants into adopting and implementing an unconstitutional plan of redistricting." Id. at 3. As fleshed out somewhat in plaintiffs' legal memorandum, the underlying legal theory of the claim is that in their successive acts of denying preclearance of the first plan, then preclearing the second plan they successfully had "coerced," the federal defendants had either misinterpreted 42 U.S.C. § 1973(b), amended Section 2 of the Voting Rights Act, and in consequence applied it unconstitutionally or, if they interpreted it correctly, had applied a facially unconstitutional provision of the Act to accomplish an unconstitutional end. Complaint at 11; Response to Motion to Dismiss at 5. The unconstitutional end, whether resulting from misinterpretation of a constitutional statute or from application of an unconstitutional statute, is alleged to be the intentional concentration of majority populations of black voters in districts that are in no way related to considerations of compactness, contiguousness, or jurisdictional communities of interest. This appears from the prayer for relief against the federal defendants, which is that they be enjoined from

imposing, directly or indirectly, any preclearance requirement that any Congressional District in the State of North Carolina have a majority population of persons in any particular race or color, and . . . from taking any action, whether under the Voting Rights Act, or otherwise, to establish or to encourage or require establishment of, a redistricting plan whereunder persons of a particular race or color . . . would be concentrated in a Congressional district that is in no way related to considerations of commpactness [sic], contiguousness and geographic or jurisdictional communities of interest.

Complaint at 15.

In essence then, this claim attempts to attack the constitutionality of the Voting Rights Act—most specifically, amended Section 2 of the Act—either facially or as applied, by challenging the actions of the named federal defendants taken under Section 5 of the Act to enforce its provisions.

The federal defendants' motion to dismiss this claim is based on two grounds: (1) that under Section 14(b) of the Voting Rights Act, 42 U.S.C. § 1973l(b), this court lacks subject matter jurisdiction to entertain it, and (2) that to the extent it seeks judicial review of the Attorney Gen-

eral's actions taken pursuant to Section 5 of the Voting Rights Act, it does not state a cognizable federal claim.

We consider these in turn. Because the exact nature of the plaintiffs' claim of unconstitutionality is not relevant to the grounds upon which the motion to dismiss is made, we need not attempt to identify them in considering this motion.

## A

Section 14(b) of the Voting Rights Act provides in pertinent part that

[n]o court other than the District Court for the District of Columbia ... shall have jurisdiction to issue any ... restraining order or temporary or permanent injunction against the execution or enforcement of [Section 5, inter alia] or any action of any Federal Officer or employee pursuant thereto.

The federal defendants contend that this provision plainly confers exclusive original jurisdiction of a claim such as plaintiffs' upon the District Court for the District of Columbia, and that this court therefore lacks subject matter jurisdiction to hear the claim. We agree.

Section 14(b) is a concededly drastic jurisdictional limitation which has nevertheless been upheld by the Supreme Court against due process challenge. South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966). As interpreted, it applies to any action, whether brought by a governmental or private litigant, that raises "substantive discrimination" questions, including, of course, challenges to the Act's very constitutionality, as contrasted to actions that seek merely to determine the "coverage" of various provisions of the Act in advance of specific applications. Compare Allen v. State Board of Elections, 393 U.S. 544, 558-59 (1969) (action by private litigant for declaratory judgment as to § 5

coverage of particular state enactment not subject to § 14(b) limitation) with Reich v. Larson, 695 F.2d 1147, 1149-50 (9th Cir. 1983) (action by private litigant challenging constitutionality of Voting Rights requirement for bilingual printing of candidacy statements subject to § 14(b) jurisdictional limitation; Allen action distinguished). See also McCann v. Paris, 244 F.Supp. 870, 872-73 (W.D. Va. 1965) (§ 14(b) covers action by private litigants challenging that provision's own constitutionality).

Within these interpretations, the plaintiffs' action plainly is covered by Section 14(b). It specifically challenges the constitutionality of the Voting Rights Act by attacking the actions of federal officials in enforcing the provisions of Section 5. The relief sought is precisely the issuance of injunctive decrees against this and comparable future acts of enforcement.

Plaintiffs have sought to avoid Section 14(b)'s limitation by amending their prayer for relief to seek declaratory relief in addition to the injunctive relief originally sought as their sole remedy. This pleading device cannot avoid the Section 14(b) limitation. The relief prayed still rests on a claim of unconstitutionality, and challenges the enforcement efforts of the Attorney General under Section 5.

The action therefore remains of the type contemplated by Section 14(b). See Allen, 393 U.S. at 558 ("The § 14(b) injunction action is one aimed at prohibiting enforcement of the provisions of the Voting Rights Act, and . . . involve[s] an attack on the constitutionality of the Act itself."). A mere addition to (or complete change, had that been attempted) in the form of specific relief prayed cannot undo that critical aspect of the claim. See Reich, 695 F.2d at 1149 (action alleging unconstitutionality of Voting Rights provision and seeking "declaratory and other appropriate relief" against its enforcement held subject to Section 14(b)).

Accordingly, we conclude that under Section 14(b), this court lacks subject matter jurisdiction over the claim against the federal defendants. They are entitled on that basis to dismissal of the claim under Fed. R. Civ. P. 12(b)(1).

B

The federal defendants also contend that to the extent the claim against them involves a challenge to the Attorney General's exercise of the discretionary power conferred on him by Section 5 to make preclearance decisions, it fails to state a cognizable federal claim. Specifically, they contend that *Morris v. Gressette*, 432 U.S. 491 (1977), long since has established that such discretionary decisions are not subject to judicial review in any court. We agree.

Without belaboring the point, we note that Morris makes it in the most emphatic way possible: by conceding that the result is to shield from direct judicial review even the most egregious defaults of an Attorney General, including any that might be prompted by the crassest of political considerations. Id. at 506 n. 23. As the court pointed out (after disclaiming any assumption of such malfeasance), under the concededly drastic provisions of the Voting Rights Act viewed whole, a Section 5 preclearance decision (or non-decision) by the Attorney General, whether up or down, is not the end of the legal road for any person or governmental entity disfavored by it. If objection is interposed, the disfavored governmental entity may seek preclearance in a de novo judicial proceeding in the District Court for the District of Columbia. If objection is not interposed within the statutory time limit (whether by express decision or non-action) any persons-such as plaintiffs here-who consider their legal or constitutional rights violated by the state enactment thereby freed up may resort to the judicial avenues available for redress against the state enactment and its enforcers. In neither event does the Attorney General's decision have any legally preclusive effect upon the follow-up judicial proceedings. Id. at 504-07 & n.21.

Plaintiffs' claim as pleaded against the federal defendants, whether viewed as being aimed only at the allegedly "coercive" effect of the challenged preclearance decisions upon later state action, or at the direct effect of these decisions upon plaintiffs' constitutional rights, inescapably is one seeking judicial review of those discretionary decisions. As such it fails to state a cognizable federal claim for relief. Accordingly, on this alternative ground as well as the jurisdictional limitations of Section 14(b), we conclude that the federal defendants are entitled to dismissal of the claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Bell v. Hood, 327 U.S. 678 (1946).

## IV

The gravamen of the plaintiffs' claim against the state defendants is that the General Assembly of North Carolina acted unconstitutionally in deliberately creating two congressional districts in which black persons constitute majorities of the overall voting-age and registered-voter populations.<sup>4</sup> This claim is expressed in various forms and

invokes several different constitutional provisions. In its most sweeping, but simplest, form, it baldly asserts that any state legislative redistricting driven by considerations of race-whatever the race, whatever the specific purpose, whatever the specific effect-is unconstitutional. Response at 5. On this basis, the claim alleges that to the extent the Voting Rights Act authorizes any race-conscious legislative redistricting, the Act is facially unconstitutional. Complaint ¶ 35, at 14; Response at 5. In the alternative, plaintiffs' claim seems to assert that in any event, racebased redistricting which is specifically intended to assure proportional representation of minority (or any?) races in Congress and fails properly to observe (undefined) considerations of contiguity, compactness, and communities of interest in drawing congressional districts to achieve that purpose-i.e., racial gerrymandering-is unconstitutional. On this basis, the claim asserts that in deliberately creating two black-voter majority congressional districts, the redistricting plan here challenged has both those vices, hence constitutes an unconstitutional application of the Voting Rights Act. Complaint at 15; Response at 3, 4. This claim, whatever its specific form, is grounded expressly in a number of constitutional provisions: the Equal Protection Clause of the Fourteenth Amendment; the Fifteenth Amendment; the Privileges and Immunities Clause of the Fourteenth Amendment; Article I, Section 2; and Article I, Section 4. Each of these provisions is alleged, in one

<sup>&#</sup>x27;As indicated in Part II, plaintiffs' complaint actually identifies as the primary unconstitutional conduct being challenged the action of the federal defendants in "misinterpreting and misapplying" Section 2 of the Voting Rights Act, thereby "coercing" the state defendants into becoming "unwilling participants" in a racially discriminatory, hence unconstitutional, redistricting process. Complaint \$36, at 14. When the state defendants predictably picked up on this "unwilling participant" theory as an implicit concession by plaintiffs of the lack of any "invidious intent" on their part, Memorandum in Support of Motion to Dismiss (hereafter Dismissal Memorandum) at 5, the plaintiffs responded by disclaiming any such effect for the "unwilling participant" theory, dismissing it—with questionable logic, given that it was their own—as the state defendants' "devil-made-me-do-it" theory. Response

at 24.

Though the anomaly is plain and may suggest a general weakness in plaintiffs' "derivative liability" theory, we do not ascribe it any ultimate significance in assessing the existence of invidious intent where that is an essential element of plaintiffs' claim. See Part IV(C)(2) infra.

A related possibility arising from this "derivative-liability" theory—that the federal defendants might be necessary parties to the claim against the "unwilling" state defendants—is not urged by the plaintiffs. Cf. United Jewish Organizations, 430 U.S. at 153-54 n.13. The only basis upon which the federal defendants are sought to be held in this action is as proper parties to the claim directly against them.

way or another relevant to its particular function, either to prohibit any race-conscious creation of congressional districts by state legislatures, or to prohibit the gerrymandered forms here challenged. We will consider these in turn, but in reverse order because, as will appear, we think the equal protection claim the only relevant, or most inclusive, one under developed constitutional doctrine respecting voting rights.

## A

We first consider plaintiffs' claim under Article I, Section 4 of the Constitution. That Section provides that the "Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators." The gist of the Article I, Section 4 claim, as we understand it, is that the constitutional provision secures to the North Carolina legislature the right to create congressional districts free of the federal control exercised by the federal defendants here; and that the state's conduct in succumbing to that improperly exercised control violated the derivative right thereby secured to plaintiffs as citizens and registered voters of the state. Complaint ¶ 24, 26, at 10, 11; id. ¶ 37, at 14, 15.

This, so far as we are aware, is a novel claim in voting rights jurisprudence. No authority for such an interpretation of Article I, Section 4 is suggested, and we decline to recognize the individual right asserted under it. As we read the provision, it is simply a positive grant of power to the states to "prescribe" their own voting processes, subject only to congressional override of particular "regulations." To the extent the Voting Rights Act is an exercise of congressional override power, it operates to validate, rather than restrict, the state's redistricting action here. We do not read the provision to impose any

structural limitation on either the state's primary power to "prescribe" its electoral processes or on Congress's override power of control. There undoubtedly are constitutional limits on both, but they do not arise from Article I, Section 4 itself.

## B

We next consider plaintiffs' claim under Article I, Section 2 of the Constitution, which provides that "[t]he House of Representatives shall be composed every second year by the people of the several states."

The theory piaintiffs seemingly advance is that this direct grant of power to the "people" to "compose" the House of Representatives directly confers upon all registered voters of the state a right to vote for representatives in districts not drawn on a race-conscious basis—a right, as the plaintiffs express it, not to have "the people divided" for this purpose "along racial lines." Complaint ¶¶ 34, 35, at 15; Response at 2, 3.5

We read Supreme Court precedent as confining the function of Article I, Section 2 to that of safeguarding the one-person-one-vote principle in matters of congressional redistricting. See Mahan v. Howell, 410 U.S. 315, 322 (1973) ("population alone . . . the sole criterion of constitutionality in congressional redistricting under Article I, Section 2"); Wesberry v. Sanders, 376 U.S. 1 (1964) (Article I, Section 2 interpreted to require conformance to one-person-one-vote standard in congressional districting). Other lower courts share this understanding. All asked, so far as we are aware, to find further voting rights protections in this provision have declined to do so on this view of Article

This right is claimed not only to be directly secured to individual citizens by Article I, Section 2, but also to be further protected by the Privileges and Immunities Clause of the Fourteenth Amendment and by the Fifteenth Amendment. Complaint ¶ 34, 35, at 13, 14.

I, Section 2's limited equal-population function. See, e.g., Anne Arundel County Republican Central Committee v. State Advisory Bd. of Election Laws, 781 F. Supp. 394, 397 (D.Md. 1991) (three-judge court) (Article I, Section 2's protection confined to one-person-one-vote principle; does not extend to claims of political gerrymandering); Pope v. Blue, No. 3:92 CV 71-P, slip op. at 11 (W.D.N.C. Apr. 16, 1992) (three-judge court) (same); Badham v. March Fong Fu, 694 F. Supp. 664, 674-75 (N.D. Cal. 1988) (three-judge court) (same), aff d mem. 488 U.S. 1024 (1989). Since Article I, Section 2 only proscribes districts of unequal population and plaintiffs make no such claim here, the claims they do make, accordingly, are not supported by Article I, Section 2.

C

We consider finally the allegations that the state's redistricting plan violates rights secured to plaintiffs by the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment, and by the Fifteenth Amendment. Because we think the Privileges and Immunities Clause inapposite to this voting rights claim,6 and the Fifteenth Amendment's protection essentially subsumed within that provided by the Equal Protection Clause,7 we confine analysis to the equal protection allegations.

At the outset of our consideration of the equal protection claim, we note one puzzling aspect of the plaintiffs' statement of that claim. They nowhere identify themselves as members of a different race than that of the black voters in whose behalf the challenged congressional districts allegedly (and concededly) were created. Nor, following this, do they plainly allege constitutional injury specific to their rights as members of a particular racial classification of voters. Indeed, in describing the constitutional injury allegedly caused by the race-conscious redistricting plan, they assert that it is injury suffered alike by "plaintiffs and all other citizens and registered voters of North Carolina-whether black, white, native American, or others." Complaint ¶ 29, at 12; id. ¶ 32, at 13. And in specifically alleging the equal protection injury, plaintiffs assert that it falls on "plaintiffs and all other voters." Id. ¶ 35, at 14. Only in alleging the Fifteenth Amendment injury do they seem to confine its impact to members "of the race or color of the plaintiffs." Id. ¶ 36, at 14.

We could, of course, interpret this as a deliberate (and humanly, if not legally, laudable) refusal to inject their own race[s] into a claim whose essence is to deplore race-consciousness in voting-rights matters. But we are reluctant to make that assumption in view of its implications for the case in its present posture. Constitutional injury to "all voters" of a state cannot of course constitute invidious racial discrimination against some voters only, hence a denial of equal voting rights protection, and such

<sup>&</sup>quot;Plaintiffs cite no authority for their assertion, Complaint ¶ 34, at 13, 14, that the right to vote for members of Congress is a "privilege" of national citizenship within the meaning of this clause. In the few cases of which we have been made aware in which the assertion has been made, it has been rejected. See, e.g., Pope v. Williams, 193 U.S. 621, 632 (1904); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 172-78 (1875). In any event, if this particular voting right were considered such a "privilege," its protection under this Clause could be no broader than that provided by the Equal Protection Clause, hence we do not consider it separately.

<sup>&</sup>lt;sup>7</sup> Racial gerrymandering and vote dilution claims (of which plaintiffs' claim must surely be considered some "reverse" variety) have generally

been treated as subject to the same analysis under the Equal Protection Clause and the Fifteenth Amendment. The essence of such a claim under either is state action that invidiously discriminates against the voting rights of some of the states' citizens on account of their race. See, e.g., Rogers v. Lodge, 458 U.S. 613, 621 (1982); Whitcomb v. Chavis, 403 U.S. 124, 149 (1971). If there is any significant difference, the protection afforded by the Equal Protection Clause is the broader. See Mobile v. Bolden, 446 U.S. 55, 61-65 (1980) (plurality opinion). We therefore do not consider the Fifteenth Amendment claim separately.

a claim would therefore be self-defeating at the threshold. While we may be doing plaintiffs' intentions (if not their legal cause) a disservice, we therefore believe it appropriate to assume that the critical allegation here is that which (implicitly at least) rests plaintiffs' Fifteenth Amendment claim on their identities as white voters (a fact of which we take judicial notice).

Construed as a challenge by white voters to the state's redistricting plan on the basis that it violates their equal protection (and parallel Fifteenth Amendment) rights by virtue of its race-conscious creation of two black-majority congressional districts, the complaint fails to state a legally cognizable claim. As indicated, the challenge is made on alternative grounds: that any race-conscious redistricting is per se unconstitutional, and that to the extent the Voting Rights Act authorizes it, the Act is facially unconstitutional, or that, alternatively, the specifically challenged redistricting plan here involves an unconstitutional application of the Voting Rights Act because it fails to observe requirements of compactness, contiguity, and communities of interest, and was driven only by concerns to assure proportional representation of black citizens in North Carolina's congressional delegation. We take these in order. noting at the outset that the fact of "race-consciousness" in the legislative creation of the two black-majority congressional districts is established for purposes of decision in this case. Not only is the plaintiffs' allegation to that effect entitled to acceptance as a procedural matter. the state defendants formally concede that the state legislature deliberately created the two districts in a way to assure black-voter majorities and thereby comply with requirements of the Voting Rights Act. Dismissal Memorandum at 12.

(1)

The broad claim of per se unconstitutionality solely because of the form of race-consciousness in redistricting at Most directly in point, United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) (hereafter UJO), still stands as direct rejection of the contention, at least where, as here, a state legislature's racially conscious purpose is to meet the broad remedial requirements of the Voting Rights Act. In dismissing a Fourteenth and Fifteenth Amendment vote-dilution challenge by white voters to the New York legislature's deliberate creation of a number of black-majority state legislative districts, Justice White, for a four-Justice plurality, specifically noted that "compliance with the [Voting Rights] Act in reapportionment cases [will] often necessitate the use of racial considerations in drawing district lines." Id. at 159. Thus, the plurality added,

the Constitution does not prevent a state subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with [the Voting Rights Act].

Id. at 161.8

<sup>\*</sup> Seven of the eight Justices deciding the case (including five of the present members of the Court) joined either expressly or by necessary implication in rejecting the unconstitutional per se contention. See id. at 155-62 (opinion of White, J., joined by Brennan, Blackmun and Stevens, J.J.); id. at 165-68 (opinion of White, J., joined by Rehnquist and Stevens, J.J.); id. at 179 (opinion of Stewart, J., joined by Powell, J.). Four expressly accepted the argument that constitutionality was established by the state's purpose of compliance with Voting Act requirements. Id at 164-65 (opinion of White, J., joined by Brennan, Blackmun and Stevens, J.J.). Four thought constitutionality established, without regard to the Voting Rights Act, by the complaint's failure to allege, as an essential element of the white voters' constitutional votedilution claim, either a discriminatory purpose in or effect from the challenged redistricting. See id. at 165 (opinion of White, J., joined by Rehnquist and Stevens, J.J.) ("no fencing out of the white population from participation in the political process"); id. at 179-80 (opinion of Stewart, J., joined by Powell, J.) (no showing "that the legislative reapportionment had either the purpose or effect of discriminating

Plaintiffs offer no valid basis for our disregarding UJO's rejection of their "unconstitutional per se" challenge to the Plan. They address UJO's facially apparent stare decisis effect only by suggesting that in light of four later Supreme Court decisions and the fact that "there was no majority opinion," they "doubt that even the court's judgment would be the same today as it was fifteen years ago." Response at 21. The four later Supreme Court decisions relied on, Powers v. Ohio, 499 U.S. \_\_\_, 111 S. Ct. 1364 (1991); Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 110 S. Ct. 2997 (1990); Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); and Freeman v. Pitts, \_\_\_ U.S. , 60 U.S.L.W. 4286 (U.S. Mar. 31, 1992) (No. 89-1290) are said to reveal such a new commitment by the Supreme Court to the "color-blind constitution" concept, that they have effectively undercut UJO's authority. Response at 12-21. This surely is permissible advocacy, but as surely is not an acceptable basis for judicially disregarding UJO's continued authority. Indeed, we see in these decisions no such intimation of a new constitutional perspective on the UJO voting rights issue as plaintiffs claim to see. None dealt directly with that voting rights issue. Powers dealt with the constitutionality of racially-motivated juror challenges; Metro Broadcasting, with racial set-asides of federal broadcast licenses; Croson, with a racial set-aside program for municipal public contracts; and Freeman, with state school desegregation decisions. All, it is fair to say, revealed varying degrees of concern about the inherent dangers of all race-conscious remedial measures-a concern undoubtedly shared by all thoughtful citizens who have pondered the matter. But none can be interpreted to reflect either a general rejection of all such measures as now seen to be per se unconstitutional, nor, even more surely, as a rejection of race-conscious redistricting by states act-

ing under the mandate of the Voting Rights Act. Indeed, one of the decisions expressly indicates continued acceptance of UJO's authority on the specific voting rights issue. In Metro Broadcasting, decided in 1990, the Court, citing UJO, said that "a state subject to § 5 . . . may 'deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with Section 5.' "497 U.S. at \_\_\_\_, 110 S. Ct. at 3019. And in Croson, decided in 1989, a majority of the Justices expressly reaffirmed the constitutionality of a federal racial set-aside program similar to the municipal one held to be unconstitutionally based. 488 U.S. at 490 (O'Connor, J.); id. at 521-23 (Scalia, J., concurring in the judgment); id. at 557-58 (Marshall, J., dissenting).

We therefore conclude that *UJO* still stands as authority for rejection of plaintiffs' "unconstitutional per se" challenge to the Plan.

(2)

Turning to the as-applied challenge, we find it equally lacking in merit. To recapitulate, the contention is that if not per se unconstitutional because of its conceded race-conscious purpose, the specific action here challenged—the creation of two racially gerrymandered congressional districts—is unconstitutional because it was undertaken solely to ensure proportional representation for black citizens in the state's congressional delegation, and without observing any considerations of geographical compactness and contiguity and of communities of interest among district residents.

By this, plaintiffs seem to be asserting that to the extent any race-conscious redistricting is justified by the requirements of the Voting Rights Act, no more is justified than

against [the white plaintiffs] on the basis of their race"; Voting Rights Act purpose only relevant as negating "invidious purpose of discriminating against white voters").

is required by the Act. That is to say, the constitutional limits of a state's remedial powers deliberately to create black—(or other minority)—majority districts is determined by the extent to which minority voters could prove entitlement to such districts under the Constitution or the Voting Rights Act. Here, the contention apparently is that black voters could not have established entitlement to the two challenged districts because of their "grotesque" non-compactness (their obviously gerrymandered configurations), hence the legislature acted unconstitutionally in creating them for the avowed purpose of complying with the Voting Rights Act (or the Attorney General's apparent interpretation of the Act's requirements).

If required to rest decision upon this contention, we might be disposed to reject its basic premise. See McGhee v. Granville County, 860 F.2d 110, 120 (4th Cir. 1988) (legislative remedial powers not limited by extent of provable Section 2 right); see also UJO, 430 U.S. at 165 (plurality opinion) (remedial action by legislature not dependent for constitutionality upon authority of or compliance with Voting Rights Act); id. at 1806 n.\* (Stewart, J., concurring) (same). We choose, however, to rest decision on another, plainer, basis.

Simply put, just as in *UJO*, the plaintiffs here have not alleged—nor could they prove under the circumstances properly before us on this record—an essential element of their equal protection (and parallel Fifteenth Amendment) claim: that the redistricting plan was adopted with the purpose and effect of discriminating against white voters

such as plaintiffs on account of their race. See UJO, 430 U.S. at 165-68 (plurality opinion); id. at 179-80 (Stewart, J., concurring). The requisite intent, for equal protection and Fifteenth Amendment purposes, is a legislative intent to deprive white voters, including plaintiffs, of an equal opportunity with all other racial groups of voters—on a statewide basis—to participate in the political process and to elect candidates of their choice. See id. While it is sadly the case in contemporary society that such an intent might be judicially inferred were the state legislature controlled by a black majority, cf. Croson, 488 U.S. at 495-96 (opinion of O'Connor, J.), that, as a matter of judicial notice, obviously is not the fact here.

Plaintiffs seem to contend that it is enough to allege and prove an intent to favor black voters—that this necessarily involves an opposing intent to disfavor white voters in the required constitutional sense. But this of course is not the constitutional equation, nor the meaning of "invidious" discrimination in equal protection jurisprudence. The one intent may exist without the other. See UJO, 430 U.S. at 165 (plurality opinion). And by plaintiffs' own version of the legislative intent here—to comply with the Voting Rights Act—the necessary invidious intent to harm them in the constitutional sense as white voters simply is not possible to prove. See id. at 180 (Stewart, J., concurring).

Neither have they alleged, nor could plaintiffs prove, the requisite unconstitutional effect under the facts indisputably before us on this motion. That is to say, they cannot establish that creation of the two "grotesque" black-majority districts—however offensive it may be to their general notions of good constitutional government—has operated to "fenc[e] out the white population of the [state, or either of the two challenged districts] from participation in the political processes of the [state or districts], [nor to] minimize or unfairly cancel out white voting strength." Id. at 165 (plurality opinion). The plan demonstrably will

This seems indicated by the plaintiffs' invocation of Section 2's "no-proportional-representation" disclaimer, and the "compactness" precondition found implicit in the statutory right by the Supreme Court in Thornburg v. Gingles, 478 U.S. 30, 50-51 & nn. 16-17 (1986), and by the plaintiffs' reliance on Judge Eisele's recent exhaustive opinion rejecting black voters' challenge to a state congressional redistricting plan in Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991).

not lead to proportional underrepresentation of white voters on a statewide basis. See id. at 166 (plurality opinion). Within the specifically challenged districts (in only one of which do any of the plaintiffs, and then only two of the five, reside), the mere fact that white voters (assuming the sad continuation for yet another season of racial bloc voting) will elect fewer candidates of their choice than if they were in white-majority districts is not a cognizable constitutional abridgement of their right to vote, and the two plaintiffs who alone are registered to vote in one of the challenged districts, the Twelfth, will suffer no cognizable constitutional injury if her or his particular candidate should lose by virtue of the district's racial composition. See id.; see also Davis v. Bandemer, 478 U.S. 109,129-34 (1986) (comparable analysis of political gerrymandering claim). We therefore conclude that the plaintiffs' complaint fails to state a claim upon which relief can be granted under the Equal Protection Clause or the Fifteenth Amendment.

V

In this "racial gerrymandering" case, plaintiffs have raised a number of questions about the political and social wisdom of the North Carolina congressional redistricting plan's creation of two tortuously configured black-majority districts. The questions they have raised, however, are in the end political ones. Though legally justiciable, none of their specific claims of constitutional violation has merit. The constitutional provisions invoked either do not secure the specific individual voting rights asserted for them, or in the case of the traditional "vote-dilution" sources—the Fourteenth and Fifteenth Amendments—fail for want of facts from which the requisite discriminatory purpose and effect required to establish violation could be found.

This does not mean that a "reverse discrimination" votedilution case may never lie against any state redistricting plan, whether undertaken to ensure compliance with the Voting Rights Act, or independently of that Act's compulsions. It only means that plaintiffs asserting such a claim must establish the requisite discriminatory purpose and effect upon them as individuals or a cognizable group that is required by constitutional voting rights jurisprudence.

Because the complaint fails to state a claim for relief under any of the constitutional provisions invoked, this action is subject to dismissal on the merits, and it has been so ordered.

J. Dickson Phillips, Jr.
J. Dickson Phillips, Jr.
United States Circuit Judge

/s/ W. Earl Britt
W. Earl Britt
United States District Judge

/s/ Richard L. Voorhees
Richard L. Voorhees
Chief, U. S. District Judge

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

RUTH	ο.	SHAW,	et	al.,	)	
		Pla	int	iffs,	)	
	,	vs.			)	Civil Action 92-202-CIV-5-BF
WILL	AM	BARR,	et	al,	) _)	(THREE-JUDGE DISTRICT COURT
					0	
Befor Distr Judge	ict	HILLII	PS,	Circi ind VO	t .	Judge, BRITT, HEES, District
		DI	SSE	NTING	OP	INION

VOORHEES, CHIEF DISTRICT COURT JUDGE, concurring in part, and dissenting in part.

I concur in Parts I, II, III(A), IV(A), IV(B), and IV(C)(1) of the majority opinion. However, I feel compelled to register my disagreement with its other portions.

I

Because this Court lacks subject matter jurisdiction as to Defendants Barr and Dunne (the "Federal Defendants"), see ante, at Part III(A), I find it inappropriate for the majority to consider, as it did ante in Part III(B), the merits of the Federal Defendants' "discretionary power" defense under Morris v. Gressette, 432 U.S. 491 (1977), and to grant an alternative dismissal under Fed. R. Civ. P. 12(b)(6). "A dismissal under both rule 12(b)(1) and 12(b)(6) has a

fatal inconsistency' and cannot stand." Ehm v. National R.R. Passenger Corp., 732 F.2d 1250, 1257 (5th Cir.), cert. denied, 469 U.S. 982 (1984) (quoting Opelika Nursing Home, Inc. v. Richardson, 448 F.2d 658, 667 (5th Cir. 1971)). district court has refused to assert jurisdiction over any controversy, consideration of the merits of the cause of action or whether relief may be properly granted thereunder is beyond the scope of the court's authority. e.g., Rhodes v. United States, 760 F.2d 1180, 1186 (11th Cir. 1985); Local 1498, Am. Fed'n of Gov't Employees v. American Fed'n of Gov't Employees, 522 F.2d 486, 492 (3rd Cir. 1975). I would prefer the Rule 12(b)(1) dismissal of the Federal Defendants described in Part III(A) ante, due to the jurisdictional limitations set forth in the Voting Rights Act, 42 U.S.C.

\$ 19731(b), without any discussion of substantive defenses or Rule 12(b)(6).

Reich v. Larson, 695 F.2d 1147 (9th Cir.),

cert. denied, 461 U.S. 915 (1983); O'Keefe

v. New York City Bd. of Elections, 246 F.

Supp. 978 (S.D.N.Y. 1965); McCann v.

Paris, 244 F. Supp. 870 (W.D. Va. 1965).

I therefore dissent from Part III(B) of the majority opinion.

#### II

The paramount discord that I must register in opposition to the majority opinion lies in the Rule 12(b)(6) dismissal of this action as to Defendants Martin, Gardner, Blue, Edmisten, Ellis, Allen, Marsh, Turner, Youngblood, and the North Carolina State Board of Elections (the "State Defendants"). I concur generally as to the majority's characterization of Plaintiffs' claims

against the State Defendants and its consideration of said claims under Article I, Sections 2 and 4 of the Constitution, see ante, at Parts IV(A) and (B), and as majority's reliance on the the continued binding precedential effect of United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) ["U.J.O."], in rejecting the attack on the Voting Rights Act as unconstitutional per se, see ante, at Part IV(C)(1). However, I disagree with the majority's adherence to an interpretation of U.J.O., as advanced by the State Defendants, that would give the North Carolina legislature unbridled discretion to implement race-conscious reapportionment plans. See ante, at Part IV(C)(2). The majority would characterize such unchecked discretion as being, in the end, "political," and therefore beyond the reach of this Court in the circumstances

presented by this case. See ante, at Part V, at 29.

That de facto interpretation, given purported the form egregious the implementation of the Voting Rights Act takes here (and which form we are required to assume exists here, taking the amended complaint in the light most favorable to Plaintiffs), is not ameliorated by the disclaimer lodged ante at Part V. By that section, the majority would leave the door ajar to theoretical future reverse discrimination plaintiffs to attack a state redistricting plan, albeit on unspecified grounds. This is difficult to square with the majority's finding elsewhere that so long as the state legislative intent is to comply with the Voting Rights Act, "the necessary invidious intent to harm [plaintiffs] in the constitutional sense as white voters

pp. 27-28. Plaintiffs are faulted for failing to bring forth evidence of invidious discrimination against them while they are summarily pre-empted from doing so, even by the most rudimentary processes of discovery.

It is well established that a federal court should deny a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (emphasis added). See also Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); I R Constr. Prods. Co. v. D. R. Allen & Son, Inc., 737 F. Supp. 895, 896 (W.D.N.C. 1990). Because such dismissal is generally disfavored by the courts, see,

e.g., Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1471 (4th Cir. 1991) (citing 2A Moore's Federal Practice, para. 12.07 [2.-5], p. 12-63), a Rule 12(b)(6) motion should be granted sparingly and with great caution. 1 See, e.g., Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989); Huelsman v. Civic Center Corp., 873 F.2d 1171, 1174 (8th Cir. 1989); Mize v. Harvey Shapiro Enters., Inc., 714 F. Supp. 220, 225 (N.D. Miss. 1989). Rule 12(b)(6) does not permit dismissal on the judge's disbelief of the complaint's factual allegations, see, e.g., Neitzke v. Williams, 490 U.S. 319, 327 (1989); Fusco v. Xerox Corp., 676 F.2d 332, 336 (8th

<sup>&#</sup>x27;In fact, "[a]s a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."

First Fin. Sav. Bank, Inc. v. American Bankers Ins. Co., 699 F. Supp. 1158, 1161 (E.D.N.C. 1988).

Cir. 1982), or the difficulty of proof facing the plaintiff, see, Haynesworth v. Miller, 820 F.2d 1245, 1254 n.73 (D.C. Cir. 1987); Adato v. Kagan, 599 F.2d 1111, 1117 (2d Cir. 1979), or the complaint's vagueness or lack of detail, see, e.g., Strauss v. Chicago, 760 F.2d 765, 767 (7th Cir. 1985), or the apparent unlikelihood that the plaintiff could succeed on the merits. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Revene v. Charles County Comm'rs, 882 F.2d 870, 872-74 (4th Cir. 1989). Instead, the appropriate inquiry is "whether the claimant is entitled to offer evidence to support the claims." Scheuer, 416 U.S. at 236. Any doubts should be resolved in favor of discovery and a subsequent trial. See, e.g., Revene, 882 F.2d at 873-74: Action Inc. v. American Repair, Broadcasting Co., 776 F.2d 143, 149 (7th

Cir. 1985); Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456, 457 n.5 (4th Cir. 1983); Williams v. Gorton, 529 F.2d 668, 672 (9th Cir. 1976), aff'd without opinion, 566 F.2d 1186 (9th Cir. 1977). Similarly, in the resolution of a Rule 12(b)(6) motion, the non-moving party has the benefit of all reasonable inferences and the presumed accuracy of all factual allegations contained in the complaint. See, e.g., Zinermon v. Burch, 494 U.S. 113, 118 (1990); Scheuer, 416 U.S. at 236; Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969); A. S. Abell Co. v. Chell, 412 F.2d 712, 715 (4th Cir. 1969); Cameron v. Martin Marietta Corp., 729 F. Supp. 1529, 1530 (E.D.N.C. 1990); 2A Moore's Federal Practice, para. 12.07 [2.-5], p. 12-63.

## A

The majority opinion in the case at bar has overstated the premise set forth by the <u>U.J.O.</u> plurality. While <u>U.J.O.</u> establishes race as one factor that may be considered in reapportionment, <u>see U.J.O.</u>, 430 U.S. at 159 (plurality opinion); <u>ante</u>, at Part IV(C)(1), it is not the sole and self-sufficient constitutional criterion. In announcing the plurality's decision, Justice White stated:

we think it also permissible for State, employing sound districting principles such as compactness population and equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be the majority.

<u>U.J.O.</u>, 430 U.S. at 168 (plurality opinion) (emphasis added). In other

words, while a State may engage in "deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with [the Voting Rights Act]," id. at 161, the State is still apply traditional and obligated to constitutionally-espoused redistricting The districts in question principles. in this case are, in the word of the majority opinion, "tortured." Ante, at 5. proffered Defendants' State The interpretation of U.J.O., countenanced by the majority, has resulted in a First District map which looks like a Rorschach ink-blot test and in a serpentine Twelfth District that slinks down the Interstate Highway 85 corridor until it gobbles in enough enclaves of black neighborhoods to satisfy a predetermined percentage of minority voters.

Plaintiffs' amended complaint explicitly alleges that the State Defendants' creation of the First and Twelfth Districts was done "arbitrarily -without contiquousness, geographical boundaries, or political subdivisions . . . . " Amended Complaint at 1. The State Defendants neither deny nor rebut this charge. Instead, they argue that, because their race-conscious reapportionment was enacted in the context of seeking approval under the Voting Rights Act, the new congressional districts must necessarily be considered to be the result of a legitimate, non-invidious discriminatory legislative purpose and are therefore constitutionally valid under U.J.O.. State Defendants' Memorandum of Law in Support of Motion to Dismiss at 2, 16; State Defendants' Reply Brief in Support of Their Motion to Dismiss at 2.

majority has apparently embraced this lex defense, operatur iniquum nemini notwithstanding its recognition that in U.J.O. only "[f]our [Justices] expressly argument that the accepted constitutionality was established by the state's purpose of compliance with Voting Ante, at 23 n.8 Act requirements." (citing U.J.O., 430 U.S. at 164-65 (plurality opinion)). See also ante, at 22, 27-28. Based upon my reading of the above-quoted passage of the U.J.O. plurality opinion, I disagree with the majority's inference that U.J.O. has created an absolute defense based on a state legislature's intended compliance with the Voting Rights Act. See infra Part II(C).

Disregard by the State Defendants of the "sound districting principles" (as espoused by Justice White, quoted above)

in the creation of the First and Twelfth Districts would puncture the U.J.O. shield as a justification for the race-conscious reapportionment in question. Timehonored, constitutional concepts districting, such as contiguity, communities of interest, compactness, residential patterns, population and equality, have maintained their obligatory effect and precedential value deterrents against equal protection encroachments by way of reapportionment based exclusively on racial criteria. See, e.g., U.J.O., 430 U.S. at 168 (plurality opinion).2 It seems

implausible that even the fiercest partisan of the Voting Rights Act would have imagined, at the time of its inception, that the Act gave carte blanche to white dominated state legislatures to draw districts virtually immune from judicial review, so long as the cry is raised: "We were only complying with the Voting Rights Act."

The majority correctly observes that mere allegation and proof of an intent to favor minority voters does not, by itself, establish the existence of invidious discrimination against majority race voters. See ante, at 27. However, Plaintiffs have shown much more in support of their cause. The Twelfth District careens for almost 160 miles, from the tobacco farms and warehouses of Durham County, through the furniture plants and

<sup>\*</sup>See also U.J.O., U.S. 430 at 172-73 (Brennan, J., concurring in part) (discussing the possibility that "a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantages treatment of the plan's supposed beneficiaries"); Plessy v. Ferguson, 163 U.S. 537, 560-61 (1896) (Harlan, J., dissenting) ("State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuation of which must do harm to all concerned.")

galleries of High Point, on into the banking and retail centers of Charlotte, ending in the textile mill country of Gastonia, and dissecting at least 12 counties in the process. The very shape of the district belies any possible contention by the State Defendants that they employed "sound districting principles" in the implementation of their reapportionment plan. In fact, they make no pretense of such a contention. In our evaluation of the Rule 12(b)(6) motion, this disregard for "sound districting principles" must be combined with the fact that in order to favor a district traversing piedmont North Carolina, the General Assembly rebuffed the

"significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina . . . [f]or the south-central to southeast area," ante, at 4-5 (quoting Letter of John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991)), and 2) the proposals of the Attorney General, the North Carolina Republican Party, and some number of nonpartisan groups. See id. at 4-5 and n.3.

These facts augur a constitutionally suspect, and potentially unlawful, intent on the part of the State Defendants.

Moreover, the majority assumes that, because the North Carolina General Assembly is controlled by a white majority, the State Defendants could not

<sup>&</sup>quot;There is a notable incongruity in the fact that, in creating two new federal congressional districts, the General Assembly wilfully truncated so many North Carolina counties, when the North Carolina Constitution forbids similar fragmented methods of districting for the reapportionment of State representatives. N.C. Const. art. II, § 5(3) ("No county shall be divided in the formation of a representative district. . . .").

have held an invidious discriminatory intent against Plaintiffs. Ante, at 27. I question the validity of such an assumption. The shift of the proposed minority-majority district from southcentral or southeast North Carolina to the piedmont area of the State and the contorted shape of the Twelfth District could be indicative of a racial animus against eastern North Carolina black voters or piedmont North Carolina white voters. See Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990) (although redistricting done primarily to protect incumbents, the fragmentation of the Hispanic voting population as the avenue to achieve that goal caused the unlawful discriminatory effect). Given notice pleading, Plaintiffs should be allowed to demonstrate, if they can, the existence of impermissible intent.

R

I have other concerns about the dispositiveness of the U.J.O. plurality opinion in the instant case. First, the U.J.O. plurality, relying on the fact that the race-conscious reapportionment at issue was confined to the boundaries of Kings County, New York, rejected the claims of unfair Petitioners' representation because unaltered white majority districts still outnumbered the reapportioned nonwhite majority districts, thereby assuring, assuming voting along racial lines, a continued majority of white elected representatives in Kings U.J.O., 430 U.S. at 166 County. (plurality opinion). "The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts

in the rest of the county." Id. at 166 n.24 (emphasis added).

I do not believe that this mitigation at the county level is equally applicable on the more geographically diverse statewide level. If a voter in the coastal First District of eastern North Carolina, for whatever reason, feels his or her interests are best represented by a certain Representative, there is little chance that the voter will be placated by the suggestion that a Representative from the mountainous Eleventh District in western North Carolina shall adequately represent his or her interests.

[Legislators] represent people, or, more accurately, a majority the voters in their districts--people identifiable needs and interests which require legislative representation, and which can often be related to geographical areas in which these people live. The very fact of geographic districting, the constitutional validity of

which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests.

Lucas v. Forty-Fourth Gen. Assembly, 377
U.S. 713, 750 (1964) (Stewart, J.,
dissenting). Over against any such
mitigating effect on the statewide level
is the greater likelihood that two voters
of different races in a given
geographically compact district will share
the same interests and concerns and elect
a mutually agreeable Representative,
irrespective of race.

Second, the race-conscious reapportionment at issue in <u>U.J.O.</u> was implemented on the basis of nonwhite majorities, which the plurality defined as including blacks, Hispanics, and Asian Americans. <u>U.J.O.</u>, 430 U.S. at 149-50 & n.5 (plurality opinion). Because the Attorney General's objection to the

initial redistricting in the instant case cited the General Assembly's failure to "give effect to black and Native-American voting strength in [south-central to southeast North Carolinal," ante, at 4 (quoting Letter of John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991) (emphasis added)), the merit of the State Defendants' motion to dismiss cannot be weighed solely on considerations of the black/white voting strength dichotomy. North Carolina's cultural diversity also encompasses Native Americans, including sizable populations of Cherokee Indians in western North Carolina and Lumbee Indians in southeastern North Carolina. knowledge, there is no "politically cohesive, geographically insular minority

group," Thornburg v. Gingles, 478 U.S. 30, 49 (1986), of Native Americans centered in piedmont North Carolina through which the Twelfth District snakes. Discovery in this area of facts might flesh out Plaintiffs' claims.

C

Furthermore, I believe the majority has discerned a <u>lex nemini operatur iniquum</u> defense in reapportionment cases from the <u>U.J.O.</u> plurality opinion that simply is not present in that opinion.

See ante, at 23 n.8 (citing <u>U.J.O.</u>, 430 U.S. at 164-65 (plurality opinion). In Part III of Justice White's opinion, joined by Justices Brennan, Blackmun, and Stevens, the plurality noted that "Petitioners have not shown that New York did more than accede to a position taken by the Attorney General that was

authorized by constitutionally our permissible construction of § 5." U.J.O., 430 U.S. at 164 (plurality opinion). The position taken by the Attorney General and acceded to by the New York legislature, as set forth in the preceding paragraph of the U.J.O. opinion and the factual summary presented by Justice White, concerned only the 65% nonwhite majority district size to be achieved by the new reapportionment plan. See id. at 152 ("A staff member of the [New York] legislative reapportionment committee testified . . . he 'got the feeling [from Justice Department officials] . . . that 65 percent would probably be an approved figure' . . . ."), 164 ("We think it was reasonable for the Attorney General to conclude in this case that a substantial nonwhite population majority--in the vicinity of 65%--would be required to achieve a nonwhite majority of

eligible voters.") (emphasis in original).

My reading of these passages suggests a more fact-specific inquiry on the issue of constitutionality, emphasizing the specific actions taken by a State legislature in response to the Attorney General's discretionary construction of § 5. Where the State's reapportionment plan simply codifies in toto the Attorney General's decisions on reapportionment, a presumption of constitutionality may be properly inferred from the legitimacy and deference accorded the Attorney General's statutory o f his performance responsibilities.4 Morris, 432 U.S. at

<sup>&#</sup>x27;In light of the Supreme Court's recent decision in Presley v. Etowah County Comm'n, \_\_ U.S. at \_\_ , 112 S. Ct. 820 (1992), I do not express any opinion as to the inviolateness of such a presumption. See Presley, \_\_ U.S. at \_\_ , 112 S. Ct. at 831 ("Deference does not mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.").

operates on the assumption that the Attorney General of the United States will perform faithfully his statutory responsibilities."). In <u>U.J.O.</u>, the New York legislature expanded the size of the nonwhite majorities in the districts in question so as to satisfy the 65% floor suggested by the Attorney General. U.J.O., 430 U.S. at 151-52.

In my opinion, however, no presumption of constitutionality or lack of invidious discrimination should attach to a reapportionment plan where, as happened here, the State legislature disregarded the Attorney General's discretionary and, therefore judicially unassailable, prescriptions for reapportionment in North Carolina.

In the instant case, the North Carolina General Assembly did revise the

first redistricting plan, as required by the Attorney General. The Defendants claim that "[t]he General Assembly chose to meet what it understood to be the Attorney General's objections . . . . " State Defendants' Memorandum of Law in Support of Motion to Dismiss at 2. However, as noted by the majority, see ante, at 4-5 & n.2, 3, the General Assembly ignored the proposals of the Attorney General and numerous partisan and nonpartisan groups by creating a second nonwhite majority district transecting piedmont North Carolina. In other words, Assembly intentionally the General disregarded the Attorney General's construction of § 5, as it applied to North Carolina's geographic minority concentrations and voting trends, in favor of its own predilections. While the Attorney General did not object to the

General Assembly's second reapportionment plan, see, e.g., Morris, 432 U.S. at 506-07 (Attorney General's preclearance does not preclude traditional constitutional challenges); Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987) (Attorney General's preclearance does not preclude challenges under the Voting Rights Act), aff'd, 932 F.2d 400 (5th Cir. 1991), the second plan did not codify in toto the Attorney General's reapportionment decision for North Carolina, and is ineligible for the Morris court's presumption of validity inferred from the Attorney General's preapportionment performance of his statutory responsibilities.

Moreover, "[t]here is no indication whatever that [the second plan] . . . was in any way related--much less necessary--to fulfilling the State's obligation under

the Voting Rights Act as defined in Beer," namely to avoid " a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" U.J.O., 430 U.S. at 183 (Burger, C.J., dissenting) (quoting Beer v. United States, 425 U.S. 130, 141 (1976)). The legislative discretion exercised by the North Carolina General Assembly, in purposeful disregard of the Attorney General's recommendations to the presumptively contrary, cannot be constitutional or free from invidious discrimination, for it was invoked and unknown implemented pursuant to an legislative intent that can be ascertained fully only by the fruition of discovery and trial in the instant case.5

<sup>\*</sup>Insulation of a State legislature's exercise of power from federal judicial review "is not carried over when state power is used as an instrument for circumventing a federally protected right."

Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

#### III

For the reasons enumerated supra, I am unable to find beyond doubt that these Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. In the instant case, the Voting Rights Act has been used to create minority-leveraged congressional districts so devoid of shape, both in absolute terms and in terms of traditional North Carolina districts, and so "uncouth" and "bizarre"6 in configuration, as to invite ridicule. See, e.g., "Political Pornography - II," Wall St. J., Feb. 4, 1992, at A14 Carolina's new (describing North congressional district map as "political "computer-generated pornography" and Outlook: "Review pornography"); Political Pornography," Wall St. J., Sept.

9, 1991, at A10 (same). To know this, one may simply inspect their computer-drafted labyrinthine convolutions superimposed upon a map of North Carolina. These districts are justified, according to the State Defendants, on grounds that the raw black/white numbers come out right, ending the inquiry. We are not presented for scrutiny, however, with facts including just what numbers were used, or why.

Moreover, it could hardly have been the intent of Congress to permit elevation of the racial criterion to the point of exclusion of all other factors of constitutional dimension, such as contiguity, compactness, and communities of interest, which bear on the rights of

<sup>\*</sup>Karcher v. Daggett, 462 U.S. 725, 762 (1983) (citing Gomillion, supra, and 40 Congressional Quarterly 1190 (1982)).

<sup>&</sup>quot;Without some requirement of compactness, the boundaries of a district may twist and wind their way across the map in fantastic fashion in order to absorb scattered pockets of partisan support."

Karcher, 462 U.S. at 755-56 (quoting Reock, "Measuring Compactness as a Requirement of Legislative Apportionment," 5 Midwest J. Pol. Sci. 70, 71 (1961)). This observation applies equally well to allegations of racial gerrymandering.

these Plaintiffs. Certainly this Court should not ignore such factors, nor should it give the constitutional nod to the State Defendants' acts and motives such as they may be, in arriving at these strange contours, without development of the evidence and a full record.

In view of the plain proscription of the fifteenth amendment that States shall not abridge the right to vote on the basis of race, it is not surprising that the court in South Carolina v. Katzenbach called the Voting Rights Act "an uncommon exercise of Congressional power," suggesting that it lies at the outer reaches of permissible law. South

Carolina v. Katzenbach, 383 U.S. 301, 334 (1966). demonstration by the The Plaintiffs thus far shows that the instant case lies at the outer reaches of permissible facts under the law, at best. demands, It by virtue the constitutional sensitivity of the issues, that the Plaintiffs be allowed to engage in discovery and elicit at least some evidence to allow this trial court to determine whether permissible limits have been breached.

Because Congress provided a mechanism for race-conscious reapportionment when it enacted the Voting Rights Act, but gave little guidance beyond the statement of purpose, it falls upon the courts to set forth constitutionally valid standards by which such reapportionment may be most effectively and equitably implemented.

See, e.q., U.J.O., 430 U.S. at 172-73

<sup>&</sup>quot;The lack of evidence . . . is, of course, not surprising, since petitioners' case was dismissed at the pleading stage. If this kind of racial redistricting is to be upheld, however, it should, at the very least, be done on the basis of record facts, not suppositions. If the Court seriously considers the issue in doubt, I should think that a remand for further factual determinations would be the proper course of action" <u>U.J.O.</u>, 430 U.S. at 183-84 (Burger, C.J., dissenting) (footnote omitted).

(Brennan, J., concurring in part) ("Once it is established that circumstances exist where race may be taken into account in fashioning affirmative policies, we must identify those circumstances, and further, determine how substantial a reliance may be placed upon race.") (footnote omitted). It is not enough to leave these standards to the vicissitudes of "politics."

For the reasons enumerated above, I concur as to Parts I, II, III(A), IV(A), IV(B), and IV(C)(1) of the majority opinion and the Rule 12(b)(1) dismissal of the Federal Defendants. As to the remaining portions of Parts III and IV, Part V, and the Rule 12(b)(6) dismissals of the Federal and State Defendants, I respectfully dissent.

## /s/ Richard L. Voorhees, Chief Judge

RICHARD L. VOORHEES, CHIEF JUDGE UNITED STATES DISTRICT COURT

## UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

No. 92-202-CIV-5-BR

RUTH O.	SHAW, et al.,	)
	Plaintiffs,	(
	v.	ORDER
WILLIAM	BARR, et al.,	(
	Defendants.	j

This action was instituted on 12 March 1992 challenging the constitutionality of the Congressional Redistricting Plan adopted by the General Assembly of North Carolina and precleared by the Attorney General of the United States pursuant to § 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973. As provided by law, a three-judge panel was appointed by the Chief Judge of the United States Court of Appeals for the Fourth Circuit to hear the case. 28 U.S.C. § 2284(a). Named as

defendants are William Barr, Attorney General of the United States, and John Dunne, Assistant Attorney General of the United States (the federal defendants); and James G. Martin, Governor of North Carolina, James Gardner, Lieutenant Governor of North Carolina, Daniel T. Blue, Jr., Speaker of the North Carolina House of Representatives, Rufus Edmisten, Secretary of State of North Carolina, the North Carolina State Board of Elections, and M.H. Hood Ellis, Chairman, and Gregg O. Allen, William A. Marsh, Jr., Ruth Turner, and June K. Youngblood, members of the North Carolina State Board of Elections (the state defendants).

The matter is before the court on motions by both the federal defendants and the state defendants to dismiss pursuant to the provisions of Rules 12(b)(1) and

12(b)(6) of the Federal Rules of Civil Procedure. A hearing was held this date in Raleigh, North Carolina.

Upon full consideration, it is the decision of the panel that both motions to dismiss be allowed. In accordance therewith, this order of dismissal is being entered this date with a written opinion to follow.

The motions to dismiss are ALLOWED and this action is hereby DISMISSED.

This 27 April 1992.

FOR THE COURT

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, MELVIN G. SHIMM ROBINSON O. EVERETT, JAMES M. EVERETT, AND DOROTHY G. BULLOCK

Plaintiffs,

v.

WILLIAM BARR, in his official capacity as Attorney General of the United States: JOHN DUNNE, in his official capacity as Assistant Attorney | General of the United States, in charge of the Civil Rights Division: JAMES G. MARTIN, in his official capacity as Governor of the State of North Carolina: JAMES GARDNER, in his official] capacity as Lieutenant Governor of the State of North Carolina, and President of the Senate; DANIEL T. BLUE, JR., in his his official capacity as Speaker of the North Carolina House of Representatives; RUFUS L. EDMISTEN, in his official capacity as Secretary of the State of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an

NOTICE OF APPEAL official agency of the
State of North Carolina;
M. H. HOOD ELLIS, in his
official capacity as Chairman
of the North Carolina State
Board of Elections;
GREG O. ALLEN, WILLAIM A.
MARSH, JR., RUTH TURNER,
and JUNE K. YOUNGBLOOD,
in their official capacities
as members of the North
Carolina State Board of
Elections,

Defendants.

NOW COME the plaintiffs through counsel and pursuant to Rule 18 of the Supreme Court Rules hereby give notice of appeal to the Supreme Court of the United States from the order and judgment of the three judge district court entered on April 27, 1992 dismissing the Complaint in this action.

This appeal is taken pursuant to Section 1253 of Title 28 of the United States Code.

This the 27th day of May, 1992.

/s/ Robinson O. Everett Robinson O. Everett N.C. State Bar #1385

pro se and as Attorney fo the other Plaintiffs

5

Suite 300 First Union Nat'l Bank Building 301 W. Main Street P.O. Box 586 Durham, N.C. 27702

Tel. (919) 682-5691

## APPENDIX C

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT AND DOROTHY G. BULLOCK,

Plaintiffs,

v.

WILLIAM BARR, in his official capacity as Attorney General of ] the United States; JOHN DUNNE, in his official capacity as Assistant Attorney General of the United States, in charge of the Civil Rights Division: JAMES G. MARTIN, in his official capacity as Governor of the State of North Carolina; JAMES GARDNER, in his official capacity as Lieutenant Governor of the State of North Carolina, and President of the Senate; DANIEL T. BLUE, JR., in his official capacity as Speaker of ] the North Carolina House of Representatives; RUFUS L. EDMISTEN, in his official capacity as Secretary of the State of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an official agency of the State of North Carolina; M. H. HOOD ELLIS, in his offi-

COMPLAINT
AND
MOTION
FOR PRELIMINARY
INJUNCTION
AND FOR
TEMPORARY
RESTRAINING ORDER

cial capacity as Chairman of the North Carolina State Board of Elections; GREGG O. ALLEN, WILLIAM A. MARSH, JR., RUTH TURNER, and JUNE K. YOUNGBLOOD, in their official capacities as members of the North Carolina State Board of Elections,

Defendants.

#### PRELIMINARY STATEMENT

This is an action challenging the constitutionality of coercive requirements imposed by the Defendants Barr and Dunne, acting in their official capacities under the purported authority of the Voters Registration Act of 1965, as amended, 42 U.S.C. Secs. 1973 et seq. ("Voting Rights Act") upon the remaining Defendants, (the "State Defendants") acting in their official capacities as State officers, in the performance of duties to formulate Congressional redistricting for North Caro-

lina to reflect the results of the 1990 census.

This action also challenges constitutionality of the Congressional redistricting plan which the Defendants formulated have and implementing as a result of the coercive requirements imposed by Defendants Barr and Dunne and their subordinates. The Plaintiffs do not base their claim on the assertion that the redistricting plan is formulated to benefit any particular political party or incumbent. Instead their claim is grounded in the unconstitutional interpretation and application of the Voting Rights Act by Defendants Barr and Dunne, acting in their capacities as officers of the United States, and the coerced and enforced acceptance of that interpretation and application by the other Defendants, acting in their capacity

as officers of the State of North Carolina, which unconstitutional interpretation has injured and impaired important rights of the Plaintiffs as citizens, residents, and registered voters of the State of North Carolina and will continue to injure and impair those rights for many years to come.

Barr and Dunne, the rights infringed are those granted expressly or implicitly by Article I, Sec. 2 and 4 and Article 4, Sec. 2, Clause 1, of the United States Constitution, by the due process clause of the Fifth Amendment, and by the Fifteenth Amendment. With respect to the acts of the State Defendants, the rights infringed are those granted expressly or implicitly by Article I, Secs. 2 and 4, of the United States Constitution and by the Fourteenth and Fifteenth Amendments. Plaintiffs seek

a declaration that Defendants Barr and Dunne have acted unconstitutionally in coercing the State Defendants into adopting a Congressional redistricting plan in North Carolina which violates the Constitution; an injunction against further actions by Defendants Barr and Dunne to coerce the Defendants into adopting and implementing an unconstitutional plan of redistricting; a declaration that the redistricting plan for North Carolina adopted and implemented by the State Defendants for the 1992 Congressional elections is unconstitutional; and an injunction against the State Defendants from allowing a Congressional election to be conducted in 1992 under this redistricting plan.

### JURISDICTION AND VENUE

This action arises under Article I,
 Secs. 2 and 4; Article IV, Sec. 2; and the

Fifth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and under 42 U.S.C. Secs. 1983 and 1988, and 2 U.S.C. Sec. 2.

- This Court has original jurisdiction of this action pursuant to 28 U.S.C.
   Secs. 1331, 1343(3) and (4), 1361 and 2284.
- 3. Venue exists under 28 U.S.C. Sec. 1391(b) because the acts and events which are the subject of this action occurred principally in Raleigh, North Carolina in the Eastern District of North Carolina.

## THREE-JUDGE DISTRICT COURT

4. Convocation of a three-judge district court is required by 28 U.S.C. Sec. 2284 because this action challenges the constitutionality of the statewide apportionment of congressional districts for the State of North Carolina.

## PARTIES

- All the plaintiffs are residents and citizens of Durham, North Carolina, and are registered to vote in that county. Prior to the 1992 Congressional redistricting, plaintiffs Shaw, Shimm, Robinson Everett and Bullock have been registered to vote in the Second District; but under the 1992 redistricting plan that has been adopted in North Carolina, plaintiffs Shaw and Shimm will vote in the Twelfth District but plaintiffs Robinson Everett and Bullock will continue to vote in the Second Congressional District. James M. Everett registered to vote after the 1992 redistricting plan had been adopted in North Carolina and currently is a registered voter in the second Congressional District.
- Defendant William Barr is the Attorney General of the United States;

and, as head of the Department of Justice, is responsible for the enforcement of civil rights under federal law and the United States Constitution. He is sued in his official capacity. Defendant John Dunne is the Assistant Attorney General of the United States and, under the direction and supervision of Defendant Barr, is in charge of the Civil Rights Division of the Department of Justice and is directly responsible for the enforcement and protection of voting rights under the Voting 'Rights Act. He is also sued in his official capacity.

7. Defendant James G. Martin is the Governor in and for the State of North Carolina and, in such capacity, is the Chief Executive Officer of the State charged with the duty of enforcing compliance with state legislation under Article II, Sec. 5(4) of the Constitution

of North Carolina. Moreover, it is the Governor's duty to issue a commission to a person elected to the United States House of Representatives upon that person's production to the Governor of a certificate of his election from the Secretary of State, pursuant to N.C. Gen. Stat. Sec. 163-194. He is sued in his official capacity.

- 8. Defendant James Gardner is the Lieutenant Governor of North Carolina and, as part of his official duties, he presides over the North Carolina Senate and certifies certain actions of the Senate. He is sued in his official capacity.
- 9. Defendant Daniel T. Blue, Jr. is the Speaker of the North Carolina House of Representatives and, in this capacity, he presides over that body and certifies certain actions taken by the House of

Representatives. He is sued in his official capacity.

- 10. Defendant Rufus L. Edmisten, Secretary of State of North Carolina, is charged with preparing a certificate of election for each person elected after the Board of Elections certifies the result to him, pursuant to N.C. Gen. Stat. Secs. 163-193, and with recording the results of elections for the United States House of Representatives, pursuant to N.C. Gen. Stat. Secs. 163-195. He is sued in his official capacity.
- 11. The North Carolina State Board of Elections is an official agency of the State of North Carolina, which has been established to supervise and conduct elections in the State of North Carolina, including elections for the United States House of Representatives. Defendant M.H. Hood Ellis is the chairman and Gregg O.

Allen, William A. Marsh, Jr., Ruth Turner, and June K. Youngblood are members of the North Carolina State Board of Elections.

All of these Defendants are charged with exercising the powers and duties of the State Board of Elections pursuant to N.C.

Gen. Stat. Secs. 163-22. These Defendants are all sued in their official capacity.

## 1992 CONGRESSIONAL REDISTRICTING

12. Pursuant to the results of the 1980 decennial census, the State of North Carolina was entitled to only eleven members in the United States House of Representatives. Because of the substantial population increase recorded by the 1990 decennial census, North Carolina is now entitled to an additional member in the United States House of Representatives. Thus, the size of the State's Congressional delegation has increased

from eleven to twelve members pursuant to 2 U.S.C. Sec. 2.

- 13. The increase in the size of the State, s population and Congressional delegation required the State of North Carolina to redistrict the State's Congressional districts, so that each of the twelve Congressional Districts would have equality in population. To this end, on July 9, 1991, the General Assembly enacted redistricting legislation as Chapter 601 of the North Carolina Session Laws of 1991.
- 14. Because portions of the State of North Carolina are subject to the preclearance procedures of Section 5 of the Voting Rights Acts, the redistricting legislation could not take effect and was unenforceable unless and until the Attorney General of the United States failed to object to the redistricting plan within a

prescribed time after its submission to him.

- 15. Following its enactment, Chapter 601, the redistricting legislation, was duly submitted by the State of North Carolina to the Attorney General for preclearance pursuant to the Voting Rights Act.
- General, acting through his subordinates in the United States Department of Justice, objected to this redistricting and refused preclearance. The basis for denying preclearance, as these Plaintiffs are informed, believe, and allege, was that the General Assembly had failed to create two Congressional Districts containing a majority of black persons and voters in order to better assure that in each district a black person would be elected to Congress; and plaintiffs further allege that by denying pre-

clearance on this basis defendants Barr and Dunne exceeded any authority they were entitled to exercise under any constitutionally proper interpretation of the Voting Rights Act. Thereby they attempted to coerce the General Assembly of North Carolina into enacting legislation that would violate the constitutional rights of the citizens, residents, and registered voters of North Carolina.

17. Because of the objection that had been made by the Defendant, Attorney General Barr, the General Assembly of North Carolina, in special session, enacted Chapter 7 (1991 Extra Session) (hereinafter "Chapter 7"), which provides for the redistricting of Congressional districts and an increase from eleven to twelve Congressional districts. Submitting to the requirements imposed by the Defendant Attorney General of the United

States, as reflected in the objection to the earlier redistricting legislation offered for preclearance, the General Assembly of North Carolina created two districts, each of which was designed and intended to contain a majority of black persons and black voters. By submitting to the requirements imposed by the defendants, Barr and Dunne, which requirements plaintiffs allege were neither authorized by the Voting Rights Act nor permitted by the United States Constitution, the General Assembly violated important rights possessed by the plaintiffs as citizens, residents and registered voters in the State of North Carolina.

18. The redistricting legislation, Chapter 7, was submitted to the Attorney General for preclearance. The Attorney General entered no objection to the new redistricting plan.

Subsequently, on February 28, 19. 1992, an action was filed against State officials by various plaintiffs objecting to the redistricting plan on several grounds. (See Pope et al v. Blue et al, Civil Action No. 3:92CV71-P, United States District Court, Western District of North Carolina, Charlotte Division.) grounds are distinct from the basis for this action; and the present Plaintiffs in no way adopt or incorporate the contentions made by the Plaintiffs in that action. A restraining order was entered in that action whereunder the filing date for the United States House of Representatives was delayed; but plaintiffs are informed, believe and allege that on or about March 9, 1992 a three judge district court, convened under 28 U.S.C., Sec. 2284, dismissed that action and dissolved the restraining order.

#### FIRST CAUSE OF ACTION

Article I, Sec. 2 of the United 20. States Constitution provides that "the House of Representatives shall be composed of members chosen every second year by the people of the several States", Article 1, Sec. 4 provides that "times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing (sic) senators." Article 4, Sec. 2 states that, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states". Fifth Amendment of the Constitution provides that no one shall "be deprived of life, liberty or property, without due process of law". The Fifteenth Amendment

states in Sec. 1 that, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude".

- "people" of the State of North Carolina; and, therefore, having registered to vote in North Carolina, have rights under Article I, Sec. 2 of the U.S. Constitution, which are "liberties" protected by the due process clause of the Fifth Amendment.
- 22. One component of due process is equal protection; and equal protection is inconsistent with discrimination on the basis of race or color.
- 23. The interpretation, application and enforcement of the Voting Rights Act by Defendants Barr and Dunne has the

effect in North Carolina of isolating a large number of black persons into two Congressional Districts separate and apart from the "people" in the other ten Congressional Districts of the State. Such application or enforcement of the Voting Rights Act by these Defendants, as Plaintiffs are informed and believe, stems from the interpretation by these two Defendants that the Voting Rights Act requires the creation of districts containing a majority of minority persons ("minority districts") to assure the election of minority persons as members of Congress from those districts.

24. This interpretation by Defendants
Barr and Dunne violates the language of 42
U.S.C. Sec. 1973(b) which provides
"...that nothing in [section 1973] establishes a right to have members of a protected class elected in numbers equal

to their proportion in the population"; and therefore, it exceeds the authority granted to these defendants under the Voting Rights Act.

- Voting Rights Act as they did and then using their disapproval of the 1991 redistricting plan adopted by the General Assembly as a means to coerce the General Assembly of North Carolina into enacting a redistricting plan which would conform to their interpretation of the Voting Rights Act, Defendants Barr and Dunne interfered in a matter which under Article 1, Sec. 4, was reserved to the authority of the State of North Carolina and its General Assembly and as to which Congress never intended federal officials to interfere.
- 26. The interpretation of the Voting Rights Act by the Defendants Barr and Dunne and their enforcement of this

interpretation by their disapproval of the 1991 redistricting plan and their threat, express or implicit to disapprove any other redistricting plan which did not conform to their requirements tended to result in the creation of Congressional districts totally unrelated to considerations of compactness, contiguous, and geographic or jurisdictional communities of interest.

Act to require the creation of "minority districts". which will insure the election of minority members of Congress, Defendants Barr and Dunne violated not only the statutory proviso of 42 U.S.C. Sec. 1973(b) but also the intent of Article I, Sec. 2 of the Constitution, which does not authorize or contemplate the creation of a system of proportional representation by race in the United States House of Repre-

sentatives, and the intent of Article 1, Sec. 4 of the Constitution, which by implication denies to Congress, or to persons reportedly acting pursuant to Federal Legislation, the authority to impose such a system upon the "people" of any state in their selection of members of the House of Representatives.

28. Acting on their erroneous interpretation of the Voting Rights Act and beyond any authority conferred on them by that Act, Defendants Barr and Dunne coerced the State of North Carolina into creating two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota for representation of the State of North Carolina in the United States House of Representatives. By so doing, Defendants Barr and Dunne deprived the plaintiffs, who are citizens of North Carolina, of

"privileges and immunities of citizens in the several states", which include the privilege of voting in elections for the House of Representatives in districts which have not been drawn or created with respect to race, the privilege of choosing a representative without being limited in that choice by the decision of any government official that the person to be elected must be of a certain race, and an immunity from any action by the United States or its officers, agents or employees which shall impose racial quotas, either for voting districts or for the House of Representatives itself.

29. By their actions and their enforcement of an erroneous interpretation of the Voting Rights Act, defendants Barr and Dunne abridged the rights of the plaintiffs and all other citizens and registered voters of North Carolina

whether black, white, native American, or others -- to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of the race or color of the voters.

"minority districts" sought by Defendants
Barr and Dunne, premised on their misinterpretation of the Voting Rights Act,
is not a permissible remedy for any
disparity that may have occurred in any
time past between the percentage of
members of any particular race who are
citizens or registered voters of the State
of North Carolina and the percentage of
persons of that same race who are members
of the House of Representatives from North
Carolina.

31. Any registered voter in North Carolina, regardless of that person's race or color, has standing to object to this unconstitutional distortion of the electoral process along racial lines by officials acting under the purported authority of the United States, as Defendants Barr and Dunne have done.

## SECOND CAUSE OF ACTION

- 32. The preceding allegations of this complaint are incorporated by reference and realleged.
- 33. The Plaintiffs, as citizens and residents of the State of North Carolina, are part of its "people"; and as registered voters in the State, they have, under Article I, Sec. 2 of the Constitution, a right to choose members of Congress. Under Article 1, Sec. 4, this right is subject to control by Congress only to a limited extent and not in the

manner in which Defendants Barr and Dunne interpreted the Voting Rights Act.

34. The right of the plaintiffs to vote for members of the House of Representatives is a right as to which the plaintiffs are entitled to "the equal protection of the laws", with respect to any action taken by the State of North Carolina. Moreover, this right to vote for members of the House of Representatives of the United States is a "privilege" of citizens of the United States within the meaning of the Fourteenth Amendment and is protected by that amendment from being abridged by the State of North Carolina. The right of the plaintiffs as citizens of the United States to vote for members of the House of Representatives is also protected by the Fifteenth Amendment against being "abridged" by the State of North Carolina

on account of the race or color of the plaintiffs.

- 35. Any action by officers of the State of North Carolina which discriminates on the basis of race or color violates this right to vote for members of Congress; denies the Plaintiffs and all other voters equal protection of the laws; and on account of race or color abridges their right to vote.
- 36. By submitting to the unconstitutional requirements imposed by Defendants Barr and Dunne, and acquiescing in the creation of Congressional Districts intended to concentrate voters of a particular race and to elect members of Congress of a particular race, the General Assembly of North Carolina became an unwilling, but necessary, participant in creating a racially discriminatory voting process for the election of members of

Congress from North Carolina; and Defendants Gardner and Blue, as part of their official duties, facilitated and implemented this action of the General Assembly. The remaining State Defendants, in various ways, as required, as part of their official duties, to join in executing the unconstitutional redistricting legislation adopted by the General Assembly in January 1992.

37. By their acts done in submission to the requirements imposed by Defendants Barr and Dunne, the State Defendants have heretofore violated, or, unless enjoined will in the immediate future inevitably violate, rights conferred upon these Plaintiffs by Article I, Sec. 2 and 4, and by the Fourteenth and Fifteenth Amendments of the United States Constitution.

WHEREFORE, Plaintiffs respectfully pray that:

- 1. The United States District Court
  Judge to whom this case is initially
  assigned, immediately notify the Chief
  Judge for the United States Court of
  Appeals for the Fourth Circuit so that a
  three-judge Court may be convened to hear
  this case in as expeditious a manner as
  feasible.
- and Dunne from imposing, directly or indirectly, any preclearance requirement that any Congressional District in the State of North Carolina have a majority population of persons of any particular race or color, and also that the Court enjoin Defendants Barr and Dunne from taking any action, whether under the Voting Rights Act, or otherwise, to establish, or to encourage or require establishment of, a redistricting plan whereunder persons of a particular race or

Color -- whether black, white, native American, or otherwise - would be concentrated in a Congressional district that is in no way related to considerations of compactness, contiguousness and geographic or jurisdictional communities of interest.

- 3. The Court declare Chapter 7 to be unconstitutional and of no further force and effect as it purports to establish Congressional districts for the State of North Carolina.
- Assembly to prepare a new redistricting plan for the State of North Carolina which will not concentrate in any Congressional district persons of a particular race or color whether black, white, native American, or otherwise -- in a manner that is totally unrelated to considerations of compactness, contiguousness, and geo-

graphic or jurisdictional communities of interest.

- 5. That upon the enactment by the General Assembly of new redistricting legislation, the new redistricting plan shall be submitted forthwith to the Defendant Attorney General for preclearance and that he shall act promptly to consider this plan without requiring, directly or indirectly, the concentration in a Congressional district of persons of a particular race or color -- whether black, white, native American, or otherwise -- in a manner that is totally unrelated to considerations of compactness, contiguousness, and geographic or jurisdictional communities of interest.
- 6. The Court permanently enjoin the defendants Ellis, Allen, Marsh, Turner and Youngblood from conducting elections for the U.S. House of Representatives in North

Carolina until the General Assembly enacts, and the Department of Justice.

preclears, a new redistricting plan as prayed for in paragraphs 4 and 5 above.

- 7. The Court enter both a temporary restraining order and preliminary injunction enjoining the defendants Ellis, Allen, Marsh, Turner and Youngblood from taking any action in preparation for primary or general elections for the U.S. House of Representatives in North Carolina until the General Assembly enacts and the Department of Justice preclears a new redistricting plan as prayed for in paragraphs 4 and 5 above.
- 8. That for purposes of consideration of any injunctive relief this complaint, when properly verified, be treated as an affidavit in this action.
- 9. That the Court award cost and attorneys fees to the plaintiffs as

against Defendants Barr and Dunne and against the United States pursuant to the Equal Access To Justice Act 28 U.S.C., Sec. 2412 or as otherwise authorized by law.

10. That the Court grant such other and further relief as may, to the Court, seem just and proper.

Respectfully submitted, this the 12th day of March, 1992.

# /s/ Robinson O. Everett

Robinson O. Everett

N.C. State Bar #1385
Pro se and as Attorney for the Other Plaintiffs

Suite 300 First Union Natl. Bank Bldg. 301 W. Main Street P.O. Box 586 Durham, NC 27702 Telephone: (919) 682-5691

#### VERIFICATION

I hereby certify and swear that I have read the foregoing allegations of the complaint in this action and that, to the best of my knowledge, they are true.

/s/ Dorothy G. Bullock
Dorothy G. Bullock

Subscribed and sworn to before me this <a href="Light">12th</a> day of March, 1992.

Joyce M. Raby Notary Public

My Commission Expires:

5/18/93

#### APPENDIX D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

No. 92-202-CIV-5-BR

RUTH O.	SHAW, et al.,	)
	Plaintiffs,	1
	v.	) AMENDMENT
WILLIAM	BARR, et al.,	) TO COMPLAINT
	Defendants.	)

Pursuant to Federal Rule 15(a) of Civil Procedure, plaintiffs hereby amend their complaint as follows:

- (1) In paragraph 27 line 10 of the complaint, substitute "purportedly" for "reportedly".
- (2) After paragraph 36 of the complaint, add a new paragraph 36(A) of the complaint as follows:

36 (A)

"Although the General Assembly initially had been unwilling to create

districts that would conform to the requirements prescribed by Defendants Barr and Dunne, the decision by the General Assembly to create two Congressional Districts in which a majority of black voters was concentrated arbitrarily -without regard to any other considerations, such as compactness, contiguousgeographical boundaries, ness. political subdivisions -- was a decision made with full awareness of the intended consequences and effects and was made with the purpose, shared with Defendants Barr and Dunne, create Congressional Districts along racial lines and to assure that black members of Congress would be elected from two Congressional Districts in which a majority of black voters were intentionally and purposefully concentrated on the basis of census data reflecting the racial composition of North

Carolina's population. Plaintiffs allege that, for purposes of the Fourteenth and Fifteenth Amendments to the United States Constitution, this intent and purpose on the part of the members of the General Assembly of North Carolina was and is a racially discriminatory intent and purpose, regardless of their motive. Plaintiffs further allege that Chapter 7, the North Carolina redistricting legislation which creates bizarre, noncontiguous, and extraordinarily dispersed districts, such as the Twelfth District (see Exhibit A to the Complaint), and which was enacted as a result of the conscious decision by Members of the General Assembly and which decision the various State defendants are now seeking to implement -- is the result of an unconstitutional and racially discriminatory intent and purpose, which were

shared by the General Assembly and the State defendants with the Federal defendants. If this legislation is allowed to take effect, it will have the racially discriminatory effects and results intended by both the Federal and State defendants."

The prayer in the complaint is amended by adding thereto a paragraph 2(A), as follows:

"2(A). that, as authorized by 28 U.S.C. § 221, the Court declare that Defendants Barr and Dunne have misinterpreted and misapplied the intent and effect of the Voting Rights Act, and especially of 42 U.S.C. § 1973, and that this Act does not authorize or permit a State legislature to create Congressional Districts with the legislative intent or purpose of requiring any particular district to contain a majority of voters

of any particular race -- white, black, Asian, or Native American -- or with the intent or purpose that a specific District elect a member of Congress of a particular race; or, in the alternative, that the Court declare that, if the Voting Rights Act does permit or authorize a State legislature to create Congressional Districts with such an intent or purpose, as all the defendants have claimed, to that extent and in that regard the Voting Rights Act is unconstitutional."

In all other respects the allegations of the complaint are realleged and incorporated by reference.

This the 17th day of April, 1992.

/s/ Robinson O. Everett Robinson O. Everett N.C. State Bar #1385

Pro se and as Attorney for the Other Plaintiffs

Suite 300 First Union Natl. Bank Bldg. 301 W. Main Street P.O. Box 586 Durham, NC 27702 Telephone: (919) 682-5691

#### CERTIFICATE OF SERVICE

I certify that I have served the foregoing amendment to the complaint and supporting memorandum of law on the Defendants by placing a copy thereof in the United States mail, postage prepaid, addressed as follows:

# As to State Defendants

Edwin M. Speas, Jr.
Senior Deputy Attorney General
N.C. Department of Justice
104 Fayetteville Street Mall
P.O. Box 629
Raleigh, N.C. 27692-0629

## As to Federal Defendants

Margaret Person Currin United States Attorney 310 New Bern Avenue Suite 800 Federal Bldg. Raleigh, N.C. 27601

and

Rebecca J. Wertz Attorney, Voting Section Civil Rights Division Department of Justice P.O. Box 66128 Washington, D.C. 20035-6128

This the 17th day of April, 1992.

/s/ Robinson O. Everett
Robinson O. Everett

# UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

# Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, et al.,

Plaintiffs.

v.

WILLIAM BARR, et al.,

Defendants.

J. RICH LEONARD, CLERK

APR 17 1992

U.S. DISTRICT COURT E. DIST. NO. CAR.

## MEMORANDUM OF LAW

After filing of plaintiffs' complaint, the defendants filed motions to dismiss. The plaintiffs are now filing an amendment to their complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, which provides:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has been placed upon the trial calendar, the party may re-amend it at any time within 20 days after it is served.

The defendants have not yet answered the complaint. Both the federal and state defendants have filed motions to dismiss. A motion to dismiss is not a responsive pleading. Smith v. Blackledge, 451 F.2d 1201, 1203, n.2 (4th Cir. 1971). See also numerous cases collected under note 48 to Federal Rule 15 in U.S.C.A. Therefore, the filing of the amendment is a matter of right under the language of Rule 15(a).

This the 17th day of April, 1992.

/s/ Robinson O. Everett Robinson O. Everett N.C. State Bar #1385

Pro se and as Attorney for the Other Plaintiffs

Suite 300 First Union Natl. Bank Bldg. 301 W. Main Street P.O. Box 586 Durham, NC 27702 Telephone: (919) 682-5691

BILED
SEP 28 1992

Supreme Court of the United States

October Term, 1992

Ruth O. Shaw, et al.,
Appellants,

٧.

William Barr, et al., Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

MOTION TO AFFIRM

LACY H. THORNBURG North Carolina Attorney General

Edwin M. Speas, Jr., Senior Deputy Attorney General H. Jefferson Powell, Special Counsel to Attorney General Norma S. Harrell\*, Special Deputy Attorney General Daniel F. McLawhorn, Special Deputy Attorney General Tiare B. Smiley, Special Deputy Attorney General

North Carolina Department of Justice Post Office Box 629 Raleigh, North Carolina 27602-0629 (919)733-3786

# QUESTIONS PRESENTED

- 1. Does the state legislature's drawing of two congressional districts with majority-minority populations violate the fourteenth and fifteenth amendment rights of white voters?
- 2. Does article I, section 2 extend beyond equal population to proscribe the drawing of congressional districts on a race-conscious basis?
- 3. Is a state's authority under article I, section 4 to create congressional districts subject to override by Congress?

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No. 92-357

# Supreme Court of the United States

October Term, 1992

Ruth O. Shaw, et al., Appellants,

V.

William Barr, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

## MOTION TO AFFIRM

The state appellees move the Court to affirm the judgment of the three-judge United States District Court for the Eastern District of North Carolina on the grounds that the

The state appellees are elected and appointed officials with responsibilities for the drawing of congressional districts and the conduct of elections in the State of North Carolina. The federal appellees are the Attorney General of the United States and the Assistant Attorney General of the United States in charge of the Civil Rights Division of the United States Department of Justice. The federal appellees are filing concurrently a separate motion to affirm the three-judge court's decision dismissing appellants' claims against them. The state appellees' motion will only address the questions presented relating to appellants' claims against the state appellees.

questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

#### STATEMENT OF THE CASE

In this appeal, appellants seek review of the order of a three-judge court dismissing their complaint against the state appellees under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Appellants are white voters, two of whom reside in a newly-created majority-minority congressional district.<sup>2</sup> Their complaint challenges the congressional redistricting plan enacted by the General Assembly of North Carolina, effective for the 1992 primaries and elections, alleging that the actions of the state defendants in creating two congressional districts with majority-minority populations for the purpose of obtaining preclearance by the federal defendants under the Voting Rights Act3 constitute an unconstitutional racial gerrymander in violation of article I, sections 2 and 4, and the Fourteenth and Fifteenth Amendments.4

The basic history of North Carolina's congressional redistricting is accurately related in appellants' complaint and jurisdictional statement. North Carolina's original redistricting plan, which contained eleven majority-white districts and one majority-black district, was submitted to the United States Department of Justice for preclearance pursuant to § 5 of the Voting Rights Act. On December 18, 1991, the federal appellees interposed an objection to the plan, essentially questioning the legislature's failure to draw a second majority-minority district. Complaint ¶ 16, J.S. App. at 79a.<sup>5</sup> In response to the objection, the General Assembly enacted a second redistricting plan, Chapter 7 (1991 Extra Session), which created two districts with majority-black populations. This plan was precleared by the federal appellees and is the subject of the complaint. Complaint ¶ 17-18, J.S. App. at 80a-81a.

In addition to ascribing constitutional violations to the federal appellees because of their objection to the state's original redistricting plan, appellants allege repeatedly in their complaint that the state appellees were coerced into enacting an unconstitutional redistricting plan. See Complaint, J.S. App. at 68a-71a, 80a-81a, 86a-88a, 92a-94a. According to the appellants, by acquiescing in the creation of congressional districts intended to concentrate voters of a particular race and to elect members of Congress of a particular race, the General Assembly of North Carolina

The term "majority-minority," as used herein in reference to congressional districts, refers to districts in which a majority of the registered voters and the voting age population are members of a racial minority.

<sup>42</sup> U.S.C. § 1973 et seq.

Although the complaint is styled as including a motion for preliminary and permanent injunction and for temporary restraining order, appellants never sought temporary or preliminary injunctive relief prior to dismissal of the action by the three-judge court.

Statement Appendix. The text of the Jurisdictional Statement is referenced as "J.S. at pp. ."

became an unwilling, but necessary, participant in creating a racially discriminatory voting process for the election of members of Congress from North Carolina. Complaint ¶ 36, J.S. App. at 93a-94a.

After motions to dismiss with supporting mermoranda were filed by the state and federal appellees, appellants attempted to bolster their claim by amending their complaint and adding conclusory allegations of discriminatory intent and purpose by the state appellees. J.S. App. at 102a-104a. At the conclusion of the hearing on the dismissal motions, appellants' complaint, as amended, was dismissed by the three-judge court, one judge concurring in part and dissenting in part, for failure to state a claim.

## **ARGUMENT**

The case presents no substantial question not previously decided by this court. For the reasons stated below the district court's decision should be summarily affirmed.

I. THE DRAWING OF TWO MAJORITY-MINORI-TY CONGRESSIONAL DISTRICTS DOES NOT VIOLATE THE FOURTEENTH AND FIFTEENTH AMENDMENT RIGHTS OF WHITE VOTERS.

Appellants seek to persuade this Court that their rights as voters have been violated under the Equal Protection Clause of the Fourteenth Amendment and under the Fifteenth Amendment solely because the North Carolina General Assembly consciously adopted a congressional redistricting

plan in which black voters comprise a majority of the registered voters in two of the state's twelve congressional districts. Their claim takes two forms. They first contend that the Constitution absolutely forbids race-consciousness in the drawing of congressional district lines and that appellants, white voters, have therefore been denied their constitutional rights by the drawing of the two majority-minority districts. Secondly, they contend that their rights are violated by the state's adoption of majority-minority districts when the districts are drawn, as they assert North Carolina's were, with no regard for principles of compactness, contiguity and communities of interest, to achieve proportional representation of minorities in order to obtain preclearance under § 5 of the Voting Rights Act.

Appellants' theory can only succeed if the Court invalidates the Voting Rights Act or renders it virtually meaningless by interpretation. Moreover, appellants ask this Court to overrule or ignore direct precedent as well as the teachings of numerous cases decided under the Fourteenth and Fifteenth Amendments. Appellants have suggested no coherent reason for the Court either to repudiate or rewrite the extensive body of law developed under the Fourteenth and Fifteenth Amendments and the Voting Rights Act. Appellants' claims should be rejected and the district court's judgment summarily affirmed.

<sup>&</sup>lt;sup>6</sup> The district court distilled appellants' somewhat amorphous and confusing equal protection and fifteenth amendment allegations and arguments into two forms. See J.S. App. at 13a, 18a, 21a. The state appellees here follow that approach in the interest of clarity.

# A. Race-Conscious Districting Is Not Per Se Unconstitutional.

# 1. Appellants' Claim Challenges the Validity of the Voting Rights Act.

Appellants base their case broadly on their contention that the Constitution unequivocally prohibits congressional districts drawn with regard to race. Complaint ¶ 28, 29, 35, J.S. App. at 88a-90a, 93a. Their notion that the Constitution can never permit the deliberate creation of majorityminority districts squarely tests the validity of the Voting Rights Act, both § 2 and § 5.7 Indeed, appellants baldly assert that the Voting Rights Act "neither requires not [sic] authorizes the creation of majority-minority districts." J.S. at p. 33. Yet, that is exactly what the Voting Rights Act does require at times. See, e.g., Thornburg v. Gingles, 478 U.S. 30 (1986); see also, Garza v. County of Los Angeles, 918 F.2d 763, 776 (9th Cir. 1990), cert. denied, U.S. , 111 S. Ct. 681 (1991) (commenting, in response to a county's reverse discrimination argument, that "[t]he deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes").

The Voting Rights Act forbids states to implement districting plans with certain harmful consequences to minorities, both intentional and unintentional. The only way a state can ensure that it complies with the § 2 and § 5 prohibitions against harming racial minorities in the redistricting process

is by consciously considering the effects on minorities of any plan it contemplates adopting. The Voting Rights Act thus requires a conscientious legislator to take race into account in making redistricting decisions. Unless the Court strikes down the Act, appellants' contention that a state must draw congressional districts without any regard to race fails to state a claim for relief.

# Appellants' Claim Is Squarely Foreclosed by Precedent.

In arguing that the Constitution flatly forbids race-conscious redistricting, appellants are following a trail closed off long ago by this Court's decision in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) ("*UJO*"). The plaintiffs in *UJO*, like appellants here, appealed the granting of a motion to dismiss their complaint for failure to state a claim for relief. Espousing a theory strikingly similar to that of appellants, the *UJO* plaintiffs contended that their four-teenth and fifteenth amendment rights were violated by New York's deliberate creation of majority-minority districts in order to gain § 5 preclearance of their legislative redistricting plan. In the plurality opinion, Justice White described the plaintiffs' arguments as follows:

first, that whatever might be true in other contexts, the use of racial criteria in districting and apportionment is never permissible; second, that even if racial considerations may be used to redraw district lines in order to remedy the residual effects of past unconstitutional reapportionments, there are no findings here

While all one hundred of North Carolina's counties are subject to § 2 of the Act, only forty are subject to § 5 preclearance requirements.

of prior discriminations that would require or justify as a remedy that white voters be reassigned in order to increase the size of black majorities in certain districts; third, that the use of a "racial quota" in redistricting is never acceptable; and fourth, that even if the foregoing general propositions are infirm, what New York actually did in this case was unconstitutional. . . .

UJO, 430 U.S. at 156. Various members of the Court expressed different reasons for rejecting the sweeping claim that race-conscious redistricting is never constitutionally permissible, but seven of eight participating Justices did indeed reject it. See opinion of Justice White, id. at 161, joined by Justices Stevens, Brennan, and Blackmun ("neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment"); opinion of Justice White, id. at 165, joined by Justice Stevens and then-Associate Justice Rehnquist (regardless of whether New York's action was dictated by § 5 of the Voting Rights Act, drawing race-conscious districts does not violate the Fourteenth and Fifteenth Amendments in the absence of an unconstitutionally discriminatory purpose and unconstitutional fencing out of white voters or minimizing or unfairly cancelling out white voting strength); opinion of Justice Stewart, joined by Justice Powell, id. at 179-180 (no showing that plan had purpose or "effect of discriminating against them on the basis of their race").

# 3. UJO Should Not Be Overruled.

Appellants seek to escape *UJO*'s barrier to their claim by urging a "need for this Court to answer the questions posed here as to that decision's continuing viability. . . . " J.S. at p. 17. They argued below, and argue here, that *UJO* "is out of step with this Court's more recent jurisprudence," J.S. at p. 30, relying on cases such as *Powers v. Ohio*, 499 U.S. \_\_\_, 111 S. Ct. 1364 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) ("*Croson*"); and *Freeman v. Pitts*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1430 (1992). In so doing, they ignore two critical factors which compel continued adherence to *UJO*.

First, Congress has broad powers under section 2 of the Fifteenth Amendment to fashion legislation designed to ensure that citizens are not deprived of an equal right to vote based on race. South Carolina v. Katzenbach, 383 U.S. 301 (1966); UJO, 430 U.S. at 156-57. In exercising this power, Congress may prohibit conduct which would not violate the first section of the amendment. City of Rome v. United States, 446 U.S. 156, 176 (1980). It is this broad remedial authority of Congress which underlies the Voting Rights Act and distinguishes the race-consciousness compelled by its

Contrary to appellants' argument, *Powers v. Ohio*, 111 S. Ct. 1364, dealing with racially-motivated juror challenges, and *Freeman v. Pitts*, 112 S. Ct. 1430, dealing with state school desegregation decisions, provide no insight into the issue raised by appellants, as noted by the majority opinion in the district court. *See* J.S. App. at 20a. Judge Voorhees, who dissented in part, concurred in this part of the majority's opinion, rejecting appellants' claim that race-conscious redistricting is *per se* unconstitutional. J.S. App. at 27a, 30a, 60a.

strictures from the racial classifications rejected by the Court in other cases. This distinction is vividly illustrated by comparing Croson, which held unconstitutional a municipal plan for minority set-asides in construction contracts, with Fullilove v. Klutznick, 448 U.S. 448 (1980) ("Fullilove"), which upheld a congressional mandate for minority set-asides in highway construction contracts. Indeed, Fullilove was specifically reaffirmed in Croson in recognition of the broad remedial powers of Congress under section 5 of the Fourteenth Amendment that parallel its sweeping authority under section 2 of the Fifteenth Amendment. 488 U.S. at 490-91 (plurality opinion); id. at 521-22 (Scalia, J., concurring); see also id. at 532-33, citing Fullilove with approval (Marshall, J., dissenting, joined by Justices Brennan and Blackmun). In fact, the Court has recently reaffirmed the broad remedial purpose underlying the Voting Rights Act and adhered to prior statements that "the Act should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." Chisom v. Roemer, 501 U.S. \_\_\_\_, \_\_\_\_, 111 S. Ct. 2354, 2368 (1991). Appellants' notion of color-blind redistricting, in which all race-consciousness in the drawing of districts is unconstitutional per se, would jettison the Voting Rights Act and would repudiate the exercise by Congress of the broad authority granted to it in section 2 of the Fifteenth Amendment.

Secondly, there is in reality no textual support in the Court's opinions for the notion that *UJO* has been fatally undercut by the Court's later decisions dealing with express racial classifications in other areas. Indeed, the Court recently relied on *UJO* in explaining why it upheld certain

minority preference policies of the Federal Communications Commission against an equal protection challenge. Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, \_\_\_\_, 110 S. Ct. 2997, 3019 (1990). In Metro Broadcasting, the Court expressly reaffirmed that "a State subject to § 5 . . . may 'deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5." Id. 110 S. Ct. 3019. The dissent in *Metro Broadcasting*, furthermore, casts no doubt upon the continued validity of UJO. Justice O'Connor (the author of the Metro Broadcasting dissent) has expressly endorsed the Court's prior decisions in UJO and other cases permitting states "to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination." Wygant v. Jackson Board of Education, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring). The reasoning and result in UJO are thus fully consistent with the well-developed body of case law under the Equal Protection Clause and the Fifteenth Amendment as well as the Voting Rights Act.

The Voting Rights Act, and the large body of case law interpreting and applying it, have "engendered substantial reliance and . . . become part of the basic framework" of our entire electoral and districting process. Quill Corp. v. North Dakota by and through Heitkamp, \_\_\_\_ U.S. \_\_\_, \_\_\_, 112 S. Ct. 1904, 1916 (1992). Thus, "[t]he 'interest in stability and orderly development of the law' that undergirds the doctrine of stare decisis . . . counsels adherence to settled precedent." Id. (citation omitted). Appellants argue for a radical departure from settled law which would upset more

than a quarter-century of redistricting and voting rights law on which voters, legislative bodies, and the courts have relied. Appellants' generalized statements about racial gerrymandering and citations to cases of little relevance offer this Court no compelling reason, indeed no reason at all, to sweep aside this voluminous body of law and revolutionize the legislative, political, and jurisprudential basis of redistricting. The Court should not, indeed must not, entertain appellants' plea that it declare race-conscious redistricting per se unconstitutional even when undertaken in response to a governmental body's obligations under the Voting Rights Act.

B. APPELLANTS FAILED TO ALLEGE A RACIALLY DISCRIMINATORY PUR-POSE OR EFFECT UNDER THE FOUR-TEENTH AND FIFTEENTH AMEND-MENTS.

Appellants contend, alternatively, that the creation of majority-minority districts constitutes unconstitutional racial gerrymandering under the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment when the districts are drawn, as they assert North Carolina's were, with no regard for principles of compactness, contiguity, or communities of interest in an effort to achieve proportional representation for minorities. J.S. at pp. 3, 13, 22; Complaint ¶ 26-27, J.S. App. at 86a-88a; ¶ 34-36, J.S. App. at 92a-94a; ¶ 36(A), J.S. App. at 101a-104a. Appellants' racial gerrymandering claim fails to state a claim for relief under both the Fourteenth and Fifteenth Amendments because appellants allege neither a legally sufficient racially

discriminatory purpose nor a legally sufficient discriminatory effect under well-established principles of constitutional law.

 Appellants Have Not Alleged Invidious Discriminatory Intent Under the Fourteenth and Fifteenth Amendments.

Appellants' equal protection and fifteenth amendment claims fail to allege the invidious racially discriminatory purpose essential to both claims. See City of Mobile v. Bolden, 446 U.S. 55, 62-63, 66-67 (1980); see also, Rogers v. Lodge, 458 U.S. 613, 617 (1982) (Fourteenth Amendment); UJO, 430 U.S. at 165 (plurality opinion); id. at 179 (Stewart, J., with Powell, J., concurring). Appellants contend that North Carolina knowingly and intentionally adopted majority-minority districts and that knowingly and intentionally placing groups of voters in districts according to their race constitutes a discriminatory purpose for both amendments. This argument fails unless the Court elects to redefine dramatically the very concept of racially discriminatory purpose.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (sex discrimination); accord City of Mobile v. Bolden, 446 U.S. at 71 n. 17 (plurality opinion) (race discrimination).

Appellants have not alleged, and could not allege, that North Carolina adopted majority-minority districts because of, not merely in spite of, their alleged effects upon white voters. They have not alleged, and could not allege, that the state appellees acted with the purpose of harming white voters. Instead, they alleged repeatedly that the state appellees acted as they did in order to satisfy requirements imposed by the federal appellees for preclearance of the congressional redistricting plan under § 5 of the Voting Rights Act. Complaint ¶¶ 17, 36, 37, J.S. App. at 80a-81a, 93a-94a. As in UJO, "[t]he clear purpose with which the

United States Department of Justice under the Voting Rights Act -- forecloses any finding that it acted with the invidious purpose of discriminating against white voters." *UJO*, 430 U.S. at 180 (Stewart, J., concurring).

Appellants argue that the Court needs to decide whether the state appellees' alleged purpose of assuring that two minority persons would be elected from North Carolina to the United States Congress is "discriminatory" for equal protection purposes. 10 They are asking this Court to sweep away years of constitutional adjudication and redefine the standards for racial discrimination under the Fourteenth and Fifteenth Amendments. 11 If deliberate creation of minority districts standing alone constitutes a sufficient racially discriminatory intent, as appellants contend, then it is difficult to see how legislators can ever confidently draw

Appellants ridicule as a "Nuremberg defense" the idea that the state appellees lacked an invidious discriminatory purpose because they acted to meet the federal appellees' objection to the original plan and to obtain preclearance rather than to harm white voters. However, it is appellants who, throughout their complaint, characterized the process as one in which the federal appellees "coerced," "required," and "imposed on" the state appellees, who "submitted" and "acquiesced" to the federal appellees' requirements. See generally, Complaint, J.S. App. at 67a-105a. The state appellees do not, contrary to appellants' argument, rely on a "Nuremberg defense" that that they acted without volition because they were forced into drawing majority-minority districts. Instead, they rely on the obvious implication of appellants' own allegations, that the complaint fails to ascribe to the state appellees an invidious discriminatory intent or purpose. Nor can appellants avoid the consequences of their characterization of the process leading to adoption of the plan by adding to their complaint conclusory allegations that the state appellees had a racially discriminatory intent and purpose, as they have attempted to do. See Complaint ¶ 36(A), J.S. App. at 101a-104a.

The dissenting opinion in the district court suggests that appellants might have been able to show a discriminatory intent against particular groups of voters in specific areas of the state. J.S. App. at 41a-44a. This argument ignores the fundamental premise of appellants' lawsuit -- that the (coerced) drawing of the majority-minority districts is itself unconstitutional without regard to the placement of the districts. Significantly, appellants have not adopted or urged this theory in their Jurisdictional Statement.

Appellants' theory, of course, would logically extend to cases other than those involving redistricting, particularly equal protection claims in which classifications are allegedly based on suspect criteria. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (alleged disproportionate impact of death penalty does not violate Equal Protection Clause in absence of showing that death penalty was enacted or maintained "because of an anticipated racially discriminatory effect."

districts in multi-racial areas. Legislators ordinarily know the likely political effects of the district lines they draw, Davis v. Bandemer, 478 U.S. 109, 128-29 (1986), and cannot be expected "simply to close their eyes to considerations such as race and national origin," UJO, 430 U.S. at 176 (Brennan, J., concurring). Even if redistricting lines were originally fashioned with no race-consciousness whatsoever, "it is most unlikely that the . . . impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." Gaffney v. Cummings, 412 U.S. 735, 753 (1973). Under the Court's established understanding of the concept of discriminatory intent, this type of unavoidable awareness of the racial effects of government action does not violate the Constitution unless it is coupled with an invidious intent to harm some identifiable racial group. See Washington v. Davis, 426 U.S. 229 (1976). Appellants' theory would convert claims of racial discrimination under the Equal Protection Clause and the Fifteenth Amendment into little more than questions of discriminatory impact, at least in the redistricting area. The Court should not accept appellants' request for it to review and redefine the invidious discriminatory intent necessary for racial discrimination under the Equal Protection Clause and the Fifteenth Amendment.

2. Appellants Have Not Alleged A Racially Discriminatory Impact Under the Fourteenth and Fifteenth Amendments.

Appellants' claim is also fatally defective because they have not alleged, and could not allege, a racially discriminatory impact within the meaning of the Equal Protection Clause or the Fifteenth Amendment. Appellants do not and cannot complain that white voters in North Carolina are "fenced out" of the political process or that white voters' electoral strength has been cancelled out in North Carolina by the districting plan adopted or that their influence on the political process will be consistently degraded in comparison to that of minority voters. <sup>12</sup> See UJO, 430 U.S. at 165 (plurality opinion); id. at 179-80 (Stewart, J., concurring); Davis v. Bandemer, 478 U.S. at 132, 138-40 (plurality opinion) (political gerrymandering).

As the district court observed, North Carolina's "plan demonstrably will not lead to proportional underrepresentation of white voters on a statewide basis," citing UJO at 430 U.S. 166 (plurality opinion). J.S. App. at 23a-24a. The dissent suggests that a statewide comparison is inappropriate. J.S. App. at 45a-47a. What the dissent ignores is that the subject of this litigation is a statewide plan and that appellants challenge the entire plan, not simply one or two districts. In UJO the challenge was only to districts in a single county, yet the plurality made a statewide comparison there. In contrast, the only relevant comparison in North Carolina is a statewide one. See also Shayer v. Kirkpatrick, 541 F. Supp. 922, 930 n. 7 (W.D. Mo.) (three-judge court), aff'd mem., 456 U.S. 966 (1982) (comparing percentage of black majority districts to percentage of black population statewide to determine whether white voting strength would be cancelled out by creating black majority district).

A voter cannot complain simply because he is in the minority in a district. Two of the five appellants live in a majority-minority district. Yet, as white voters in a majority-minority district, they will have the same rights as all other voters to register, to vote, to support candidates of their choice, to join political parties, and otherwise to participate in the political process. Cf. Anne Arundel County v. State Administrative Board of Election Laws, 781 F. Supp. 394, 401 (D. Md. 1991) (three-judge court), aff'd mem., U.S. , 112 S. Ct. 2269 (1992). The election of a minority representative to Congress would not violate these appellants' rights any more than the rights of minorities are automatically violated when they are placed in districts with majority white populations and represented by white Congresspersons. "[T]he individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote." UJO, 430 U.S. at 166 (plurality opinion). "An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." Davis v. Bandemer, 478 U.S. at 132 (plurality opinion). Absent a showing that white voters have been fenced out of the process or that their voting strength has been deliberately cancelled out or consistently degraded through the redistricting process, the fact that some white voters may be represented by minority Congresspersons in majority-minority districts is not a cognizable "injury" to anyone. See Whitcomb v. Chavis, 403 U.S. 124, 149-153 (1971).

Appellants have suggested to this Court no constitutionally recognized adverse racial impact suffered by them because of the creation of two majority-minority districts. Indeed, it is difficult to see how appellants have stated any particular "injury" to themselves any more than minority citizens can automatically assert "injury" by the creation of white majority districts. True, neither the Constitution nor the Voting Rights Act guarantees proportional representation, but neither do they forbid it. North Carolina's deliberate creation of two majority-minority districts (and ten majority-white districts) does not in and of itself establish an adverse impact upon these appellants, who have alleged no impediment to their full participation in the political process.

Appellants have advanced no cogent reasons why the Court should note probable jurisdiction. The district court correctly rejected appellants' fourteenth and fifteenth amendment claims, and its judgment should be summarily affirmed by this Court.

# II. ARTICLE I, SECTION 2 IS AN EQUAL POPU-LATION REQUIREMENT AND DOES NOT PROSCRIBE THE DRAWING OF DISTRICTS ON A RACE-CONSCIOUS BASIS.

Article I, section 2 has previously been construed solely as an equal population requirement and has never been extended to proscribe the drawing of congressional districts on a race-conscious basis. Citing no authority for the proposition, appellants ask this Court to expand the scope of article I, section 2 to buttress their claim of unconstitutional racial gerrymandering.

Article I, section 2 of the Constitution provides that "[t]he House of Representatives shall be composed every second year by the people of the several states." From these words appellants attempt to advance a theory that "the people" is a "unifying" concept and that this constitutional provision, as modified by section 2 of the Fourteenth Amendment, prohibits the drawing of districts on a race-conscious basis. J.S. at pp. 19-20.

As recognized by the entire three-judge court, appellants' claim under article I, section 2 is contrary to the settled precedent interpreting that clause. J.S. App. at 15a-16a; id. at 29a-30a (Voorhees, concurring). Under prior decisions of this Court, the clause has been confined to an equal population requirement. See Mahan v. Howell, 410 U.S. 315, 322 (1973) ("population alone . . . the sole criterion of constitutionality in congressional redistricting under Article I, § 2"); Wesberry v. Sanders, 376 U.S. 1 (1964) (Article I, section 2 requires congressional districting within an individual state to conform to the one-person, one-This Court has summarily affirmed the vote standard). rejection by lower courts of any attempts to read additional requirements into the clause in light of the provision's limited equal protection function. See, e.g., Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws, 781 F. Supp. at 397 (Article I, section 2's protection confined to one-person, one-vote principle); Badham v. March Fong Eu, 694 F. Supp. 664, 674-75 (N.D. Cal. 1988) (three-judge court), aff'd mem., 488 U.S. 1024 (1989) (Supreme Court "has made it clear that Article I, Section 2 only proscribes districts of unequal population").

Appellants advance no reasons why this Court should depart from established precedent to expand the scope of article I, section 2 to reach a racial gerrymandering claim. The complaint's attack on race-conscious districting gains nothing in validity by being labelled an article I rather than a fourteenth and fifteenth amendment claim.

Appellants do not challenge the population equality of North Carolina's congressional redistricting plan, and the district court properly held that appellants failed to state a claim under article I, section 2 of the Constitution.

# III. THE NORTH CAROLINA LEGISLATURE'S AUTHORITY UNDER ARTICLE I, SECTION 4 TO CREATE CONGRESSIONAL DISTRICTS IS SUBJECT TO OVERRIDE BY CONGRESS.

The North Carolina legislature's authority under article I, section 4 to create congressional districts is subject to Congress's override power, which in this instance has been exercised through the Voting Rights Act. Article I, section 4 provides that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Appellants' apparent claim is that this clause reserves to the state legislature the authority to draw congressional districts without federal interference and denies to Congress, or to persons acting pursuant to federal legislation, the authority to impose what appellants allege is a "system of proportional representation by race in the United States House of Representatives." Complaint ¶¶ 25, 27, J.S. App. at 86a-88a.

Appellants have never cited any authority for their proposition, which the district court characterized as a "novel claim in voting rights jurisprudence." J.S. App. at 14a. The district court unanimously declined to recognize appellants' claim under article I, section 4.13 J.S. App. at 14a-15a; id. at 29a-30a (Voorhees, concurring). On its face, this provision is simply a grant of power to the states to "prescribe" their own voting procedures. However, the clause also explicitly subjects the states' authority to congressional override of any election procedures, except for the "Place of chusing Senators," which is not relevant here. The Voting Rights Act is just such an exercise of the congressional override power and validates the state's redistricting actions taken to comply with the requirements of the Act. As cogently explained by the district court, article I, section 4 does not impose any structural limitations on the state's power to prescribe electoral processes or on Congress's override power of control. See J.S. App. at 14a-15a. Whatever constitutional limits may exist to constrain the state's or Congress's consideration of race in the redistricting process, they do not arise from article I, section 4. Appellants' racial gerrymandering claim more properly falls under

the Fourteenth and Fifteenth Amendments. The appellants' contentions under this clause present the Court no basis for noting probable jurisdiction.

#### CONCLUSION

The state appellees respectfully submit that the questions upon which this case depends are so unsubstantial as not to need further argument. Therefore, the state appellees move the Court to affirm summarily the judgment entered in the cause by the three-judge United States District Court for the Eastern District of North Carolina.

Apparently conceding that article I, section 4 does not support a free-standing constitutional claim of racial gerrymandering, appellants in their Jurisdictional Statement couple the clause to the Fifteenth Amendment. See J.S. at pp. 21-22.

Respectfully submitted,

LACY H. THORNBURG North Carolina Attorney General

Edwin M. Speas, Jr. Senior Deputy Attorney General

H. Jefferson Powell Special Counsel to Attorney General

Norma S. Harrell\* Special Deputy Attorney General

Daniel F. McLawhorn Special Deputy Attorney General

Tiare B. Smiley Special Deputy Attorney General

North Carolina Department of Justice Post Office Box 629 Raleigh, North Carolina 27602-0629 (919) 733-3786

September 28, 1992

\*Counsel of Record

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No. 92-357

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

RUTH O. SHAW, ET AL., APPELLANTS

v.

WILLIAM BARR, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

KENNETH W. STARR Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

## QUESTIONS PRESENTED

- 1. Whether the district court properly dismissed appellants' claims against the federal appellees for lack of jurisdiction pursuant to Section 14(b) of the Voting Rights Act of 1965, 42 U.S.C. 1973l(b).
- 2. Whether the district court properly dismissed appellants' claims against the federal appellees for failure to state a claim because appellants impermissibly sought judicial review of the Attorney General's exercise of his unreviewable enforcement discretion under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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## In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-357

RUTH O. SHAW, ET AL., APPELLANTS

v.

WILLIAM BARR, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

#### MOTION OF THE FEDERAL APPELLEES TO AFFIRM

Pursuant to this Court's Rule 18.6, the United States moves to affirm the judgment of the district court.

#### OPINION BELOW

The opinion of the district court (J.S. App. 1a-60a) is unreported.

## JURISDICTION

The judgment of the district court was entered on April 27, 1992. A notice of appeal (J.S. App. 64a-66a) was filed on May 27, 1992, and the jurisdictional statement was filed on August 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

#### STATEMENT

1. As a result of the 1990 Decennial Census, North Carolina became entitled to a twelfth seat in the United States House of Representatives. Accordingly, in July 1991, the North Carolina General Assembly enacted legislation to redistrict the State into twelve congressional districts. One of the proposed districts had a majority of black persons of voting age and of black persons registered to vote. J.S. App. 2a.

Because 40 of North Carolina's 100 counties are subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, the State submitted its redistricting plan to the Attorney General of the United States for preclearance.¹ On December 18, 1991, the Attorney General, acting through the Assistant Attorney General for Civil Rights, interposed a timely objection to the proposed plan. J.S. App. 3a.

In response to the Attorney General's objection, the North Carolina General Asssembly enacted a new congressional redistricting plan. That plan created a second district in which blacks constituted a majority of the voting age population. J.S. App. 4a-5a. On January 28, 1992, the State submitted that plan to the Attorney General for preclearance under Section 5. On February 6, 1992, the Attorney General advised the State that no objection would be interposed to the plan.

2. On March 12, 1992, appellants (who are five registered voters of Durham County, North Carolina) brought this action against Attorney General William Barr and Assistant Attorney General John Dunne (the federal defendants), together with various North Carolina state officials and agencies. Appellants challenged the constitutionality of the revised redistricting plan and alleged that the federal defendants' "unconstitutional interpretation and application of the Voting Rights Act" coerced the state defendants into adopting that plan. J.S. App. 69a. More specifically, appellants alleged that the federal defendants exceeded the authority granted them by the Voting Rights Act and unlawfully interpreted and enforced the Act in such a manner as to coerce the State into creating two districts with a majority of black persons and black voters without regard to "considerations of compactness, contiguous[ness], and geographic or jurisdictional communities of interest," Id. at 87a. Appellants sought declaratory and injunctive relief, including a declaration that the redistricting plan was unconstitutional and an injunction enjoining the federal defendants from "imposing, directly or indirectly, any preclearance requirement that any Congressional District \* \* \* have a majority

<sup>&</sup>lt;sup>1</sup> In jurisdictions covered by Section 5, no change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect on the date the jurisdiction became covered under the Voting Rights Act may be enforced unless and until the change is declared, in a suit brought by the covered jurisdiction against the United States in the United States District Court for the District of Columbia, to be without the purpose or effect "of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. Alternatively, a covered jurisdiction may submit such change to the Attorney General of the United States for administrative review. If the latter procedure is invoked, the change may be enforced if the Attorney General "has not interposed an objection within sixty days after such submission." 42 U.S.C. 1973c.

population of persons of any particular race or color." *Id.* at 95a.<sup>2</sup>

A three-judge court was designated pursuant to 28 U.S.C. 2284, and both state and federal defendants filed motions to dismiss the complaint. On April 27, 1992, the court held a hearing on those motions. At that time, in light of the imminence of primary elections scheduled for May 5, 1992, the court orally announced its decision to grant the motions and entered an order of dismissal. J.S. App. 5a-6a, 61a-63a. A written opinion was issued on August 7, 1992. *Id.* at 1a-60a.

3. The district court held that, under Section 14(b) of the Voting Rights Act, 42 U.S.C. 1973*l*(b), it lacked subject matter jurisdiction over appellants' claims against the federal defendants. J.S. App. 9a-11a. Section 14(b) provides, in relevant part, that

[n]o court other than the District Court for the District of Columbia \* \* \* shall have jurisdiction to issue \* \* \* any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of [this Act] or any action of any Federal officer or employee pursuant hereto.

The court reasoned that appellants' action was covered by Section 14(b) because it "challenges the constitutionality of the Voting Rights Act by attacking the actions of federal officials in enforcing the provisions of Section 5." J.S. App. 10a. The court further explained that appellants could not avoid the effect of Section 14(b) by amending their complaint to seek declaratory relief in addition to an injunction, because "[t]he relief prayed [for] still rests on a claim of unconstitutionality, and challenges the enforcement efforts of the Attorney General under Section 5." J.S. App. 10a. Accordingly, the court concluded that it lacked subject matter jurisdiction over appellants' claims against the federal defendants, and dismissed those claims under Fed. R. Civ. P. 12(b)(1). J.S. App. 11a.

The court also ruled in the alternative that the federal defendants were entitled to dismissal of appellants' claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. J.S. App. 11a-12a. Relying on this Court's decision in *Morris* v. *Gressette*, 432 U.S. 491 (1977), the district court held that the Attorney General's exercise of his discretionary authority under Section 5 is not subject to review in any court.<sup>3</sup>

Chief District Judge Voorhees filed an opinion concurring in part and dissenting in part. J.S. App. 26a-60a. He agreed with the majority's determination that the court lacked jurisdiction over appellants' claims against the federal defendants. *Id.* at 27a. He found it inappropriate, however, for the majority to consider the alternative ground for dismissal of those

<sup>&</sup>lt;sup>2</sup> Appellants' original complaint sought only injunctive relief against the federal defendants. J.S. App. 95a-96a. After the United States filed its motion to dismiss, however, appellants amended their complaint to add, in part, a prayer for declaratory relief against the federal defendants. *Id.* at 104a-105a. Appellants sought a declaration that the federal defendants "misinterpreted and misapplied the intent and effect of the Voting Rights Act," or, in the alternative, that the Act is unconstitutional to the extent it permits or authorizes a state legislature intentionally to create congressional districts designed to contain a majority of voters of a particular race. *Id.* at 104a-105a.

<sup>&</sup>lt;sup>3</sup> The court also addressed appellants' claims against the state defendants, and granted the state defendants' motion to dismiss. J.S. App. 12a-25a. The United States did not address those claims below.

claims under Fed. R. Civ. P. 12(b)(6); in his view, once the court had determined that it lacked subject matter jurisdiction over the claims against the federal defendants it should simply have dismissed those claims without proceeding to consider them on the merits. J.S. App. 27a-29a.

#### ARGUMENT

The district court properly dismissed the complaint against the federal defendants for lack of subject matter jurisdiction, and, alternatively, for failure to state a judicially cognizable claim. The court's judgment follows from the plain language of Section 14(b) and from decisions of this Court interpreting the Voting Rights Act. Moreover, the decision below does not involve a substantial question under the Act and does not conflict with any decision of this Court or any other federal court. Accordingly, plenary review is not warranted, and the judgment should be summarily affirmed.

1. a. As the district court correctly recognized (J.S. App. 9a), Section 14(b) of the Voting Rights Act is a jurisdictional limitation that grants exclusive jurisdiction to the United States District Court for the District of Columbia over all claims for injunctive relief against the execution or enforcement of Section 5. As the Senate Judiciary Committee's report on the Voting Rights Act made clear, the effect of Section 14(b) is that "[a]ll challenges to the constitutionality or legality of any provision of this bill or any action taken pursuant to it must be litigated in the District

Court for the District of Columbia." S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 31 (1965). The purpose of Section 14(b) was further explained on the floor of the Senate in opposition to a proposed amendment to delete it from the Act:

It is obvious that a great many suits unquestionably will be arising from enforcement of the act. If the pending amendment were adopted and this provision were taken out of the bill, suits could be going on in many districts within the same circuit. Different suits could be going on in different circuits. All of them would lack uniformity. It is conceivably [sic] that there might be different rulings in two districts of the same circuit.

We felt that it would be commendable to have one court handle these matters in order to have uniformity.

111 Cong. Rec. 11,473-11,474 (1965) (remarks of Senator Tydings).

In South Carolina v. Katzenbach, 383 U.S. 301, 331-332 (1966), this Court upheld the jurisdictional limitation of Section 14(b) against the claim that it violated the due process rights of litigants required to bring suit in a distant forum. And in Allen v. State Bd. of Elections, 393 U.S. 544, 558 (1969), the Court explained that Section 14(b) applies to actions "aimed at prohibiting enforcement of the provisions of the Voting Rights Act." The lower courts have

<sup>&</sup>lt;sup>4</sup> Judge Voorhees also dissented in part from the majority's resolution of appellants' claims against the state defendants. J.S. App. 29a-60a.

<sup>&</sup>lt;sup>5</sup> The Court in Allen distinguished those actions that are subject to Section 14(b) from actions brought against a State to prohibit enforcement of a state enactment that violates the Voting Rights Act. 393 U.S. at 558. In the latter context, the Court explained, the suit could be heard by any district court that otherwise had jurisdiction, because the suit was

made clear that the jurisdictional limitation of Section 14(b) extends to suits brought by private individuals. See, e.g., Reich v. Larson, 695 F.2d 1147, 1149-1150 (9th Cir.) ("Section 14(b) applies to all suits, whether brought by an individual or a state, which raise constitutional challenges to the Voting Rights Act."), cert. denied, 461 U.S. 915 (1983). In short, those courts that have been presented with actions initiated to challenge the constitutionality of any portion of the Act, or to block its enforcement, have uniformly held that such claims must be brought in the United States District Court for the District of Columbia. See also United States v. Ramsey, 353 F.2d 650, 656 (5th Cir. 1965) (dictum); Morgan v. Katzenbach, 247 F. Supp. 196, 198-199 (D.D.C. 1965), rev'd on other grounds, 384 U.S. 641 (1966); O'Keefe v. New York City Bd. of Elections, 246 F. Supp. 978, 981 (S.D.N.Y. 1965); McCann v. Paris, 244 F. Supp. 870, 872-873 (W.D. Va. 1965). Appellants cite no authority to the contrary, and we are aware of none.

b. The district court correctly held that appellants' claim against the federal defendants is subject to the jurisdictional bar of Section 14(b). As the court stated, the complaint "specifically challenges the constitutionality of the Voting Rights Act by attack-

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one to enforce the Act rather than prevent its enforcement. *Ibid*. Similarly, the Court explained that declaratory judgment actions brought by private litigants to determine whether a particular state enactment was subject to Section 5 could be brought in any federal district court, whereas actions seeking a declaration that a particular state enactment actually complied with the substantive requirements of Section 5 had to be brought in the District of Columbia. 393 U.S. at 558-559.

ing the actions of federal officials in enforcing the provisions of Section 5," and "[t]he relief sought is precisely the issuance of injunctive decrees against this and comparable future acts of enforcement." J.S. App. 10a. For example, the complaint alleges that the Attorney General adopted an "unconstitutional interpretation and application of the Voting Rights Act" in objecting to North Carolina's original redistricting plan and in preclearing the State's revised plan. Id. at 69a. Moreover, the complaint prays for an injunction to prevent the Attorney General from enforcing Section 5 in accordance with his interpretation of the Act's requirements. Id. at 95a-96a. It follows that, pursuant to Section 14(b), appellants' claims against the federal defendants can be brought, if at all, only in the United States District Court for the District of Columbia.

c. Appellants contend (J.S. 40) that this action is not subject to Section 14(b) because their complaint was amended to include a prayer for declaratory relief against the federal defendants. As the district court noted, however, "[t]he relief prayed [for] still rests on a claim of unconstitutionality, and challenges the enforcement efforts of the Attorney General under Section 5." J.S. App. 10a. Permitting declaratory judgment actions of this type to proceed would defeat the central purpose of Section 14(b), which was to require that all challenges to the validity or enforcement of the Act be brought in one court. See S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 31 (1965): see also Reich v. Larson, 695 F.2d at 1149 (applying Section 14(b) to claim for "declaratory and other appropriate relief"); cf. California v. Grace Brethren Church, 457 U.S. 393, 407-411 (1982) (Tax

Injunction Act, 28 U.S.C. 1341, which prohibits district courts from entering injunctions in certain circumstances, also prohibits the issuance of declaratory relief in those circumstances, because permitting such relief would defeat the central purpose of the Act). Accordingly, appellants' claims against the federal defendants were properly dismissed for lack of jurisdiction.

2. The district court also dismissed appellants' complaint because appellants sought to obtain judicial review of the Attorney General's unreviewable exercise of his enforcement discretion under Section 5. That ruling was correct, and provides an independent ground for affirming the judgment below.

a. In Morris v. Gressette, 432 U.S. 491 (1977), this Court held that the Attorney General's exercise of administrative discretion under Section 5 is not subject to judicial review in any court. The Court reasoned that Congress intended administrative preclearance of proposed voting-law changes to be a speedy alternative to the option of seeking judicial preclearance in the United States District Court for the District of Columbia. 432 U.S. at 501-505. Moreover, the Court noted that the Attorney General's exercise of his discretion under Section 5 was not conclusive with respect to the validity of submitted state laws: if the Attorney General interposed an objection to a proposed change in voting laws, the State could seek judicial relief in the District of Columbia District Court; if the Attorney General declined to interpose an objection, that fact would not bar subsequent challenges to the validity of the new law. 432 U.S. at 505-506. Accordingly, the Court concluded that "Congress intended to preclude all judicial review of the Attorney General's exercise of discretion

or failure to act" under Section 5. 432 U.S. at 507 n.24.

As the Court in Morris made clear, the rule prohibiting any judicial review of the Attorney General's application of Section 5 does not prevent private citizens from challenging election schemes that have received administrative preclearance. 432 U.S. at 505-507; see 42 U.S.C. 1973c ("Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object \* \* \* shall bar a subsequent action to enjoin enforcement [of a change in voting laws]."). Thus, appellants remain free to challenge the constitutionality of North Carolina's redistricting plan in a suit against state officials, despite the fact that the plan received administrative preclearance. Appellants may not, however, obtain declaratory or injunctive relief concerning the Attorney General's prior (or future) Section 5 determinations.

Appellants' suit against the federal defendants is plainly one seeking review of the Attorney General's exercise of his enforcement discretion under Section 5. The complaint challenges the federal defendants' "interpretation, application and enforcement" of the Voting Rights Act, and seeks a judicial pronouncement that the federal defendants acted illegally in objecting to the first redistricting plan and in "coerc-[ing]" the adoption of the second redistricting plan. E.g., J.S. App. 84a-86a. Accordingly, the district court properly dismissed appellants' complaint against the federal defendants for failure state a claim.

<sup>&</sup>lt;sup>6</sup> The fact that appellants sought both declaratory and injunctive relief is of no consequence in this context; Morris

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b. Appellants seek to avoid the clear mandate of *Morris* v. *Gressette* by arguing that they do not seek "to control the exercise of the Attorney General's discretion"; instead, appellants contend, they seek merely to prevent the Attorney General "from acting outside the scope of his discretion." J.S. 40. The reach of *Morris*, however, cannot be so limited. The Court made clear in that case that the Attorney General's decisions under Section 5 are insulated from all judicial review, even if he exercises his statutory discretion in a wholly lawless or arbitrary fashion. See 432 U.S. at 506-507 nn. 23, 24. Thus, appellants' attempt to evade the prohibition against judicial review announced in *Morris* cannot withstand scrutiny.

Appellants also contend (J.S. 40-41) that the Attorney General's presence as a defendant in this case is necessary in order to ensure that they can receive meaningful relief. That contention is both irrelevant and incorrect. Whatever the merit of appellants' assertion that they must obtain relief directly against the Attorney General, the simple fact is that *Morris* v. *Gressette* bars precisely the type of relief appellants seek. Furthermore, it is readily apparent that the Attorney General is not an indispensable party in this action; "objection by the Attorney General is not the exclusive method of challenging changes in a State's voting laws." *Morris*, 432 U.S. at 505 n.20.

As noted above, appellants are free to challenge the constitutionality of North Carolina's revised congressional redistricting plan, and the Attorney General's failure to object to that plan is not conclusive in such an action.

Even if appellants were to succeed in their challenge to the State's plan, the absence of the Attorney General as a party would not prevent issuance of meaningful relief. A judicially drawn redistricting plan could be promulgated to remedy any constitutional violations without the need to seek Section 5 review. See McDaniel v. Sanchez, 452 U.S. 130, 138 (1981); Connor v. Johnson, 402 U.S. 690 (1971) (per curiam). Alternatively, a newly revised state plan could be submitted for administrative or judicial preclearance. 42 U.S.C. 1973c. Accordingly, appellants clearly err in contending that the Attorney General is a necessary party in this litigation.

#### CONCLUSION

The judgment of the district court should be summarily affirmed.

Respectfully submitted.

KENNETH W. STARR Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JESSICA DUNSAY SILVER THOMAS E. CHANDLER Attorneys

**OCTOBER 1992** 

v. Gressette squarely holds that "Congress intended to preclude all judicial review." 432 U.S. at 507 n.24 (emphasis added).

<sup>&</sup>lt;sup>7</sup> To be sure, actions for declaratory relief may be brought against the United States under Section 5 to obtain judicial preclearance of proposed election-law changes, but such actions can be brought only in the United States District Court for the District of Columbia. 42 U.S.C. 1973c.

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ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

APPELLANTS' BRIEF IN RESPONSE TO MOTION OF THE FEDERAL APPELLEES TO AFFIRM

Robinson O. Everett COUNSEL OF RECORD Suite 300, 301 W. Main Street Durham, N.C. 27702 (919) 682-5691

Jeffrey B. Parsons
Everett, Gaskins, Hancock &
Stevens
127 West Hargett Street
Raleigh, N.C. 27602
(919) 755-0025
Counsel for Appellants

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RALEIGH DIVISION

APPELLANTS' BRIEF IN RESPONSE TO MOTION OF THE FEDERAL APPELLEES TO AFFIRM

Pursuant to this Court's Rules 18.8 and 21.4, the appellants respond to the Motion of the Federal Appellees to Affirm.

## STATEMENT

In their complaint, as amended, appellants (who are five registered voters

of Durham County, North Carolina) sought relief both against the Federal appellees, Attorney General Barr and Assistant Dunne, and against Attorney General various North Carolina officials (J.S. According to their App. 67a-99a). Federal appellees allegations, the initiated an unconstitutional sequence of events which resulted directly in the loss of various rights guaranteed to appellants as registered voters by Article I, Sections 2 and 4; Article IV, Section 2, clause 1; and the Fifth, Fourteenth, and Fifteenth Amendments of the United States Constitution. (Ibid.)

In seeking to uphold the three-judge district court's dismissal of the action as to them, the Federal appellees now have filed a Motion to Affirm which relies on a claimed "lack of jurisdiction pursuant to

Section 14(b) of the Voting Rights Act of 1965, 42 U.S.C. 19731(b)", and on "the Attorney General's "exercise of his unreviewable enforcement discretion under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c." (Motion to Affirm at p. i)

#### ARGUMENT

If appellants were seeking to regulate the exercise of Attorney General Barr's discretion under Section 5 of the Voting Rights Act of 1965, the contention of the Federal appellees might have merit. However, these appellees have mistaken the thrust of appellants' claims.

Appellants have sued because their precious constitutional rights as registered voters have been violated by both the Federal appellees and the State appellees. Perhaps, as the Federal

appellees contend, "the Attorney General's decisions under Section 5 are insulated from all judicial review, even if he exercises his statutory discretion in a lawless or arbitrary fashion." (Motion to Affirm at p. 12). However, Congress never intended to "insulate" the Attorney General from judicial review of the constitutional claims of registered voters that he has acted in a racially discriminatory manner and with an invidious discriminatory intent in violation of the Fifth and Fifteenth Amendments.

"We begin with the strong presumption that Congress intends judicial review of administrative action." Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). This presumption is even stronger when a claim is made that the administrative action violates

constitutional rights.

Thus, in Webster v. Doe, 486 U.S. 592, 603 (1988), this Court recently ruled that, although 5 U.S.C. 701(a)(2) and 50 U.S.C. 403(c) precluded judicial review of employment termination decisions made by the Director of the Central Intelligence Agency, these statutory provisions did not "exclude review of constitutional claims." As Chief Justice Rehnquist explained:

Petitioner maintains that, no matter what the nature of respondent's constitutional claims, review is precluded by the language and intent of § 102(c). petitioner's view, all Agency employment termination decisions, even those based on policies normally repugnant to Constitution are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims. emphasized in Johnson v. Robison, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be

Id. at 373-374. clear. Weinberger v. Salfi, 422 U.S. 749 (1975), we affirmed that view. We require this heightened showing in "serious to avoid the constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. See Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n. 12(1986).

## Id. at 486 U.S. 603 (1988)

If Section 5 of the Voting Rights Act is given the meaning on which the Federal appellees insist, the "serious constitutional question" to which the Chief Justice refers comes to the forefront. Appellants will have no accessible judicial forum for their constitutional claims against federal officials.

According to the Motion to Affirm, "appellants' claims against the federal defendants can be brought, <u>if at all</u>, only in the United States District Court for

the District of Columbia." (at page 9). (Emphasis supplied). With respect to the emphasized language, we call to the Court's attention that, from the outset of this litigation, the Federal appellees have forthrightly acknowledged doubt that appellants could sue in the District Court for the District of Columbia. Indeed, the language of the Voting Rights Act seems to contemplate that any action in the District of Columbia can only be filed by a State or a subdivision thereof. Cf. 42 U.S.C. 1973c. Thus, if the Federal appellees are correct, the appellants would be denied "any judicial forum for [their] colorable constitutional claim." See Webster, supra at 603 and Bowen, supra at 681, n. 12. (Emphasis added)

The Federal appellees claim that as to them Section 14(b) of the Voting Rights

Act of 1965, 42 U.S.C. 19731(b), deprived three-judge the district court of jurisdiction to consider appellants' constitutional claims. However, the statutory language does not require this result. Its limitation on "jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c" has relevance to the judicial declaration requested by appellants that the federal appellees have unconstitutionally required the North Carolina Legislature to create two majority-minority districts. wise, the restriction on jurisdiction to issue "any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of subchapter I-A to I-C of this chapter or any action of any federal officer or employee pursuant hereto" does not seem

intended to prevent registered voters from joining the Attorney General as a party defendant in an action they bring to contest the constitutionality of a congressional redistricting plan that has already been enacted by the state legislature and precleared by the Attorney General.

In Morris v. Gressette, 432 U.S. 491, 501-504 (1977), the Court suggested that Congress did not wish to permit the delays that might ensue if judicial review were allowed of the Attorney General's decisions whether to preclear or object to a redistricting plan. However, the problem of delay is not present when, as here, the Attorney General has already exercised his discretion not to object to a redistricting plan and that plan now is being challenged on constitutional grounds

by the registered voters whom it has injured.

In Morris the Court commented (at 506-7):

discriminatory "Where the character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional But it cannot be litigation. questioned in a suit seeking review of the Attorney General's exercise of discretion under § 5, or his failure to object within the period. (Emphasis statutory supplied)

Appellants' suit in a three-judge district court in North Carolina does not seek review of the Attorney General's exercise of discretion under Section 5 or his failure to object to the plan created at his behest. Instead, it is "traditional constitutional litigation"; and nothing in Morris - or in 19731(b) - states specifically that the Attorney General may not be made a defendant in such litigation.

Furthermore, the appellants' attack goes beyond the issue of how Section 5 of the Voting Rights Act should be interpreted by the Federal appellees. Indeed, the five appellants are all residents of a county which is not even subject to Section 5 of the Voting Rights Act; and they submit that -- at least as to them and other registered voters in the counties not covered by Section 5 -unconstitutional action taken by the Attorney General in applying that Section was not intended by Congress to be "insulated" from constitutional attack.

The Federal appellees also contend that they are not indispensable parties in this litigation and that "if appellants were to succeed in their challenge to the State's plan, the absence of the Attorney General as a party would not prevent

issuance of meaningful relief." (Motion to Affirm at 12-13). The alternatives they propose are disheartening.

One is a "judicially drawn redistricting plan", whereby the task of Congressional redistricting is removed from the elected State legislators and turned over to federal judges. Under this scenario, the result of the Attorney General's dogmatic and unconstitutional insistence on the creation of two majority-minority districts in North Carolina would ultimately be the injection of the Federal Courts even more directly into the politically sensitive process of Congressional redistricting - at the expense of State responsibility and control. This clearly was not intended by Congress.

The second alternative is submission

of "a newly revised state plan ... for administrative or judicial preclearance" pursuant to 42 U.S.C. 1973c. However, if the Attorney General is dismissed as a party to this suit, he will be free in the future to apply the same unconstituional requirement of two majority-minority districts in North Carolina and a stalemate will result. If judicial preclearance is sought in the District Court of the District of Columbia -whether initially or to break a stalemate after the Attorney General has rejected a revised plan -- the appellants have no standing to participate in those judicial proceedings. In sum, the alternatives suggested by the Federal appellees are circuitous, cumbersome, and ineffective; they provide no meaningful remedy to appellants for the violation of their

constitutional rights as registered voters.

In United Jewish Organizations v. Carey, 430 U.S. 144, 154 n.13 (1977) (hereinafter "U.J.O."), the Attorney General had been sued "because he allegedly caused State officials to deprive petitioners of their constitutional rights." Similarly, in the present case the appellants have sued the Attorney General because they claim that he caused the North Carolina Legislature to enact a congressional redistricting plan which violated their constitutional rights and became the nation's prime example of "political pornography".

In <u>U.J.O.</u>, the Attorney General was subsequently dismissed as a party defendant; and, because the dismissal was not raised on appeal to this Court, the

issue was left open. 430 U.S. at 154, n.13. Now the issue is before this Court for decision. Appellants submit that -in light of the presumption of reviewability of administrative action, the presence of colorable constitutional claims, and the absence of statutory language demonstrating an unequivocal congressional intention to preclude review of those claims -- the decision now should be to uphold jurisdiction over the Federal appellees. Cf. Webster v. Doe, supra. The "insulation" from suit which they claim under 42 U.S.C. 19731(6) was never meant by Congress to extend to this type of suit.

## CONCLUSION

The questions posed by Appellants are substantial with respect to both the Federal and State Appellees. Instead of

summarily affirming the decision below, the Court should note probable jurisdiction, receive briefs, hear oral argument, and give plenary consideration to the vital constitutional issues which appellants have raised.

Respectfully submitted this the 9th day of November, 1992.

Robinson O. Everett
N.C. State Bar #1385
COUNSEL OF RECORD
Everett, Gaskins, Hancock
& Stevens
P.O. Box 586
Suite 300 FUNB Building
301 West Main Street
Durham, N.C. 27701
(919) 682-5691

Jeff Parsons
N.C. State Bar #16006
Everett, Gaskins, Hancock
& Stevens
Suite 600
127 West Hargett Street
P.O. Box 911
Raleigh, N.C. 27602
(919) 755-0025

Attorneys for Appellants

92-357

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IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Petitioners,

v.

WILLIAM BARR, et al.,

Respondents.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF NORTH CAROLINA, RALEIGH DIVISION

APPELLANTS' BRIEF ON THE MERITS

ROBINSON O. EVERETT\*

JEFFREY B. PARSONS

EVERETT, GASKINS, HANCOCK

& STEVENS

Suite 300 FUNB Bldg.

301 West Main Street

Durham, N. C. 27702

(919) 682-5691

Counsel for Petitioners

\*Counsel of Record

JURISDICTIONAL STATEMENT FILED AUG. 25,1992 PROBABLE JURISDICTION NOTED DEC. 7, 1992

## QUESTION PRESENTED

I.

WHETHER A STATE LEGISLATURE'S INTENT TO COMPLY WITH THE VOTING RIGHTS ACT AND THE ATTORNEY GENERAL'S INTERPRETATION THEREOF PRECLUDES A FINDING THAT THE LEGISLATURE'S CONGRESSIONAL REDISTRICTING PLAN WAS ADOPTED WITH INVIDIOUS DISCRIMINATORY INTENT WHERE THE LEGISLATURE DID NOT ACCEDE TO THE PLAN SUGGESTED BY THE ATTORNEY GENERAL BUT INSTEAD DEVELOPED ITS OWN.

#### LISTING OF ADDITIONAL PARTIES

#### APPELLANTS

MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES
M. EVERETT, and DOROTHY G. BULLOCK.

#### APPELLEES

JOHN DUNNE, Assistant Attorney General of the United States, in charge of the Civil Rights Division; JAMES G. MARTIN, Governor of the State of North Carolina; JAMES GARDNER, Lieutenant Governor for the State of North Carolina; DANIEL T. BLUE, JR., Speaker of the North Carolina House of Representatives; RUFUS L. EDMISTEN, Secretary of the State of North Carolina; CAROLINA STATE BOARD THE NORTH ELECTIONS; M.H. HOOD ELLIS, Chairman of the North Carolina State Board of Elections; GREGG O. ALLEN, WILLIAM A. MARSH, JR., RUTH TURNER, and JUNE K. YOUNGBLOOD, in their official capacities as members of the North Carolina Board of Elections.

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#### IN THE

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1992

No. 92-357

RUTH O. SHAW, et al.,

Petitioners,

v.

WILLIAM BARR, et al.,

Respondents.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF NORTH CAROLINA, RALEIGH DIVISION

## APPELLANTS' BRIEF ON THE MERITS

## OPINIONS BELOW

On August 7, 1992, the Memorandum Opinion of the three-judge court was filed in the United States District Court for the Eastern District of North Carolina in Shaw v. Barr, (Case No. 92-202-CIV-5-BR). This Opinion is set out in the Appendix to the

Jurisdictional Statement (at pp. 1a-25a), together with the Concurring and Dissenting Opinion of Judge Voorhees (Id. at 27a-63a.)

#### JURISDICTION

The Order appealed from was filed on April 27, 1992 and the Notice of Appeal from this Order was filed on May 27, 1992. (See Appendix to Jurisdictional Statement at 61a-66a). This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

#### CONSTITUTIONAL AND STATUTORY

#### PROVISIONS INVOLVED

This case arises under:

(a) Article I, Section 2 of the Constitution of the United States, which provides in pertinent part:

The House of Representatives shall be composed of members chosen in every second year by the people of the several states; . . . . (b) Article I, Section 4 of the Constitution of the United States, which provides in pertinent part:

The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

(c) Section I of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;

(d) the Fifteenth Amendment to the Constitution of the United States, which provides in pertinent part:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of

The Appendix to the Jurisdictional Statement is cited herein as "J.S. App."

servitude.

(e) Title 42, Section 1973b of the United States Code, which provides in pertinent part:

A violation of subsection (a) is established if, based on the totality of circumstances it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a), and that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: Provided. that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(f) Title 42, § 19731(b), which provides in pertinent part:

No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 1973g of this title shall have jurisdiction to issue any declaratory judgment pursuant to section 1973(b) or 1973(c) of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of subchapters I-A to I-C of this chapter or any action of any Federal officer or employee pursuant hereto.

(q) Chapter 7 of the 1991 Extra Session Laws of North Carolina (hereinafter "Chapter 7"), the challenged congressional redistricting statute, which amends the North Carolina Elections Code, Chapter 163, Article 17 of the North Carolina General Chapter 7 is reprinted as Statutes. Exhibit 2 in the appendix jurisdictional statement filed by the appellants in this Court in Pope v. Blue, (No. 91-2038), in which the judgment of the lower court was summarily affirmed, 112 S.Ct. 30 (Oct. 5, 1992). Immediately after Chapter 7, which appears on pages 62a-132a of that Appendix, are maps of the twelve congressional districts (pages 133a-145a).

Ten copies of that jurisdictional statement have been lodged with the Clerk of the Court.

#### STATEMENT OF THE CASE

As a result of population increases reflected in the 1990 Decennial Census, North Carolina became entitled to a twelfth seat in the United States House of Representatives. Accordingly, on July 9, 1991, the General Assembly of North Carolina enacted legislation whereunder the State would be redistricted into twelve Congressional Districts. Under this redistricting plan one district, the First District, had a majority of black persons of voting age and of black persons registered to vote. This proposed majority-minority district was in the northeastern part of the State. (J.S. App. at 2a).

Because 40 of the State's 100 counties

are covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973b, the General Assembly submitted this redistricting plan for preclearance by the Attorney General of the United States pursuant to 42 U.S.C. § 1973c. By letter of December 18, 1991,2 Assistant Attorney General Dunne, interposed a formal objection to the plan because "the proposed configuration of the district boundary lines in the southcentral to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state". (J.S. App. at 3a). According to this letter, it appeared that the General Assembly "chose not to

This letter, from which the lower court quoted extensively, is reprinted at pp. 54a-61a of the appendix to the jurisdictional statement filed by appellants in Pope v. Blue, (No. 91-2038); and ten copies of that jurisdictional statement have been lodged with the Clerk of Court.

give effect to black and Native-American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state." (J.S. App. at 3a-4a). Appellee Dunne also remarked that the General Assembly

was well aware of significant interest on the part of the minority community in creating second majority-minority congressional district in North Carolina. For the southcentral to southeast area, there were several plans drawn providing for second majority-minority congressional district, including at least one alternative presented to the legislature.... These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district dismissed for what appears to

be pretextual reasons.

J.S. App. at 4a.

In response to the Attorney General's objection to its first redistricting plan, the General Assembly on January 24, 1992, enacted new redistricting legislation which created a second majority-minority district, the Twelfth District. The majority opinion in the court below comments that this district is

in a thin band, sometimes no wider than Interstate Highway 85, some 160 miles long, snaking diagonally across Piedmont North Carolina from Durham to Gastonia. As a result of the tortured configuration of the Twelfth District and other features of the Plan. many precincts, counties, and towns in North Carolina are divided among two or even three congressional districts.

(J.S. App. 4a-5a).

According to the dissent in the Court below,

the General Assembly's second

redistricting plan has resulted in a First District map which looks like a Rorschach ink-blot test and in a serpentine Twelfth District that slinks down the Interstate Highway 85 corridor until it gobbles in enough enclaves of black neighborhoods to satisfy a predetermined percentage of minority voters.

. . . . . .

(J.S. App. at 37a)

[T]he Voting Rights Act has been used to create minorityleveraged congressional districts so devoid of shape. both in absolute terms and in terms of traditional North Carolina districts, and so "uncouth" and "bizarre" in configuration, as to invite ridicule. See, e.q., "Political Pornography - II," Wall St. J., Feb. 4, 1992, ... (describing North Carolina's new congressional district map as "political pornography" and "computer-generated pornography"); "Review Outlook: Political Pornography," Wall St. J., Sept. 9, 1991, ... . To know this, one may simply inspect their computer-drafted labyrinthine convolutions superimposed upon a map of North Carolina.

(J.S. App. at 56a - 57a) 3

After the second redistricting plan had been precleared by the Attorney General, the Republican Party of North Carolina and various other plaintiffs filed a suit complaining of political gerrymandering. However, this action was dismissed by a three-judge district court; and, upon appeal, that judgment was summarily affirmed by this Court. Pope v. Blue, No. 3:92CV71-P \_\_F.Supp.\_\_, 1992 WL 378742 (W.D.N.C. April 16, 1992), affirmed, 112 S.Ct. 30 (October 5, 1992).

On March 12, 1992 the five Plaintiff-Appellants sued in the Eastern District of

North Carolina's Twelfth Congressional District also is discussed by George Will in his recent book, Restoration, (at pp. 40-50 (1992)). His book also has maps of the almost equally grotesque congressional districts which have been created in Illinois, Florida, and Texas in order to implement "cagetorical representation". (Ibid.)

North Carolina to enjoin permanently the implementation of the redistricting plan and for other related relief. (J.S. App. at 5a, 95a - 99a, 104a - 105a). Unlike the action filed previously by the Republican Party, Appellants did not allege political gerrymandering; instead they claimed that there had been racial gerrymandering.

According to their complaint, as amended, all five Appellants are registered voters in Durham County, North Carolina; and under the 1992 redistricting plan two of them -- Shaw and Shimm -- will vote in the Twelfth Congressional District and the other three in the Second District. ¶ 5 (J.S. App. at 73a). Appellants asserted

that, as a condition for preclearance under the Voting Rights Act, the Attorney General had required the General Assembly of North Carolina to "create two Congressional Districts containing a majority of black persons and voters" ¶ 16 (J.S. App. at 79a). This requirement was imposed in order "to assure the election of minority persons as members of Congress from those districts" ¶ 23 (J.S. App. at 85a) and "to meet a racial quota for representation of the State of North Carolina in the United States House of Representatives." ¶ 28 (J.S. App. at 88a).

According to the complaint, the General Assembly initially had refused to comply with the Attorney General's requirement that it "create two Congressional Districts in which a majority

The majority opinion in the court below recites that "Plaintiff James Everett, also a resident of Durham County... will vote in the Twelfth District." Appellants are unaware of the basis for this statement, which is contrary to the allegations of the Complaint, (J.S. App. at 73a) and also is factually incorrect. However, this error does not

appear to be material for purposes of this appeal.

of black voters was concentrated arbitrarily -- without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions"; but ultimately "a decision [was] made with full awareness of the intended consequences and effects and was made with the purpose, shared with Defendants Barr and Dunne, to create Congressional Districts along racial lines and to assure that black members of Congress would be elected from two Congressional Districts in which a majority of black voters were intentionally and purposefully concentrated on the basis of census data reflecting the racial composition of North Carolina's ¶ 36(A) (J.S. App. 102a population." 103a).

The Complaint claimed that, in imposing the requirement of two majority-

minority districts, the Attorney General had misinterpreted the Voting Rights Act and, as a consequence had violated Appellants' constitutional rights "to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of the race or color of the voters." ¶ 29 (J.S. App. at 90a). More specifically, they alleged:

With respect to the acts of Defendants Barr and Dunne, the rights infringed are those granted expressly or implicitly by Article I, Secs. 2 and 4 and Article 4, Sec. 2, Clause 1, of the United States Constitution, by the due process clause of the Fifth Amendment, and by the Fifteenth Amendment. respect to the acts of the State Defendants, the rights infringed are those granted expressly or implicitly by Article I, Secs. 2 and 4, of the United States Constitution and by the Fourteenth and Fifteenth Amendments.

Preliminary Statement

in the Complaint (J.S. App. at 70a).

20

All the Defendants filed motions to dismiss. After considering briefs and hearing oral arguments, the three-judge court ruled that it lacked jurisdiction over the federal Defendants because of the preclusion provisions in Sec. 14(b) of the Voting Rights Act, 42 U.S.C. § 19731(b), and also, that the complaint had failed to state a cognizable claim for relief against them. Likewise, the Court held that Appellants had failed to state any valid claim against the State Defendants.

Appellants gave timely notice of appeal and then filed their Jurisdictional Statement, which posed five questions. In turn, on December 7, 1992 this Court noted probable jurisdiction and specified a question to be briefed by the parties.

#### SUMMARY OF ARGUMENT

The Attorney General refused to grant preclearance under Section 5 of the Voting Rights Act unless the North Carolina Legislature created two majority-minority congressional districts. In doing so, his focus was solely on race; and all other factors, such as compactness, contiguousness, community of interest, and the boundaries of governmental subdivisions were deliberately ignored. Thereafter, in order to obtain preclearance from the North Carolina Attorney General, the General Assembly was equally "raceconscious" in adopting its second redistricting plan, which created two convoluted majority-minority districts.

In attempting to justify this plan, the State Appellees and the three-judge District Court relied especially on <u>United</u>

Jewish Organizations v. Carey, 430 U.S. 144

(1977) (hereafter <u>U.J.O.</u>). According to their interpretation of <u>U.J.O.</u>, the Voting Rights Act authorizes the creation of majority-minority districts. Moreover, this racial discrimination is benign and therefore is permitted under the Fourteenth and the Fifteenth Amendments.

If this interpretation is correct, <u>U.J.O.</u> is inconsistent with two lines of precedent from this Court. The first line is formed by decisions which apply the one-person, one-vote principle and treat the right to vote as a personal right, rather than a group right. The second line is composed of decisions which stand for the principle that the "Constitution is colorblind."

The lower court seemed to believe that, under <u>U.J.O.</u>, the racial discrimination involved in creating two majority-minority districts must be

presumed to be benign because 40 counties in North Carolina are subject to Section 5 of the Voting Rights Act. This interpretation of <u>U.J.O.</u> not only runs counter to the Court's insistence on strict scrutiny of racial quotas, but also gives the Voting Rights Act an effect never intended by Congress.

When strict scrutiny -- indeed, any scrutiny -- is given to the redistricting plan, the two majority-minority districts are found to be constitutionally wanting. No court or agency has determined that racial discrimination has ever occurred in the creation of congressional districts in North Carolina. Indeed, it is clear that none has taken place; and so there was no constitutional violation to be remedied by establishing two majority-minority districts.

The State Appellees and the court

below apparently interpreted U.J.O. to mean that the General Assembly did not adopt its second redistricting plan with "invidious" discriminatory intent, because its plan was intended to satisfy the Attorney General's requirements for preclearance. However, in view of the "purposeful" nature of the General Assembly's conduct, its racially discriminatory intent was "invidious". To hold otherwise would open the door for the Attorney General and state legislatures to violate flagrantly the voting rights of American citizens. Under the circumstances of this case, their version of the "Nuremberg defense" does not aid the State Appellees.

### ARGUMENT

I. IN CONGRESSIONAL REDISTRICTING BENIGN RACIAL DISCRIMINATION IS A CONSTITUTIONAL OXYMORON.

Appellants alleged that North Carolina's two majority-minority districts

were created in order to assure that a black member of Congress would be elected from each district (J.S. App. at 79a, 85a, 88a, 89a, 93a, 102a). These allegations have never been contested by any of the Appellees; and, as recognized by the court below, they are "entitled to acceptance as a procedural matter" (J.S. App. at 18a). Thus, in this case no issue arises as to which party bears the burden of proving why the majority-minority districts were created.

Instead, the first question to be confronted on this appeal is whether the creation of two majority-minority congressional districts was per se unconstitutional when the purpose for creating them was to fill a racial quota for electing members of the United States House of Representatives. Whatever may be implied to the contrary by the plurality

opinion in <u>U.J.O.</u>, see 430 U.S. at 161, two lines of this Court's precedent dictate an affirmative answer to this question.

A. The Majority-Minority Districts Are Inconsistent with the Principle of "One Person, One Vote".

Soon after <u>Baker v. Carr</u>, 369 U.S. 186 (1962), this Court held the Georgia county unit system unconstitutional, <u>Gray v. Sanders</u>, 372 U.S. 368 (1963); and, in doing so, it observed:

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote -whatever their race, whatever their sex, whatever their whatever occupation, their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when

he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

Id. at 379-380.

[T]here is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State.

. . . . . .

Id. at 381.

The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote.

. . . . . .

Id. at 376. 5

Subsequently, in considering the requirements for congressional redistricting, the Court held that

Roemer, 111 S.Ct. 2354 (1991) where, in footnote 31 of its opinion, the majority quotes approvingly from Gray v. Sanders.)

"construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." See Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964). The Court also emphasized:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Id. at 17-18. (Emphasis supplied)

In <u>Reynolds v. Sims</u>, 377 U.S. 533 (1964), the Supreme Court upheld a claim that the Equal Protection Clause required application of the "one-person, one-vote"

standard to the election of state legislators. While recognizing that Wesberry had been based on Art. I, Sec. 2 of the Constitution, rather than on the Fourteenth Amendment, the Court observed:

Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

Id. at 560-561. (Emphasis added)
The court also pointed out:

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in United States v. Bathqate, 246 US 220, 227, 52 L ed 676, 680, 38 S Ct 269, "[t]he right to vote is personal . . "

. . . . .

Id. at 561.

Almost a century ago, in Yick Wo v. Hopkins, 118 US 356, 30 L ed 220, the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights."...

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Id. at 562.

In a comment seldom quoted but especially relevant to the present case, the Court also stated:

Furthermore. the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone. (Imphasis supplied)

Id. at 568.

Although the court below was of the view that Article I, Section 2 has no relevance to racial gerrymandering, (J.S. App. at 15a-16a), the language of Wesberry, as explained and applied in Reynolds, leads to a contrary conclusion. The "fundamental principle of representative government" established in Wesberry does not permit consideration of group rights based on race, sex, or economic status. To use race as the criterion for picking the which into congressional districts Appellants and other registered voters would be placed -- as was done by the General Assembly at the instance of the Attorney General -- is totally inconsistent with that "fundamental principle".

Reynolds emphasizes that the right to vote is "individual and personal in nature". This leaves no room for the

"categorical representation" approach employed by the Attorney General, whereunder various minority groups are considered to be entitled to elect someone to Congress who is a member of their group.

Finally, if the Alabama legislative districts, which "presented little more than crazy quilts, completely lacking in rationality", "could be found invalid on

that basis alone", there can be no justification for the "political pornography" in North Carolina, which irrationally created the "serpentine" Twelfth Congressional District and other monstrosities.

B. Our "Color-Blind" Constitution Prohibits Creation of Majority-Minority Districts for the Purpose of Filling Racial Quotas in Congress.

The creation of majority-minority congressional districts in order to elect a quota of minority persons to Congress also is inconsistent with this Court's line of decisions invalidating racial barriers because they violated the Fourteenth and Fifteenth Amendments. These decisions flow naturally from Justice Harlan's pronouncement almost a century ago that our "Constitution is color-blind" and that the post-Civil War amendments had "removed the race line from our governmental systems"

<sup>&</sup>lt;sup>6</sup> In Wells v. Rockefeller, 394 U.S. 542 (1969), the Court rejected a group rights approach to congressional redistricting in New York. There the Court ruled that New York could not justify "its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact. ... To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be represented at the expense of districts with different orientations." Id. at 546. Insofar as equal protection is concerned, a "group rights" approach also conflicts with this statement in Shelley v. Kraemer, 334 U.S. 1, 22 (1948): "The rights created by the first section of the Fourteenth Amendment are, by its terms, quaranteed to the individual. The rights established are personal rights."

see, Plessy v. Ferquson, 163 U.S. 537, 555, 559 (1896), (Harlan, J. dissenting). For example, the Equal Protection Clause was relied on in Brown v. Board of Education, 347 U.S. 483 (1954), where a unanimous Court outlawed de jure school segregation; Reitman v. Mulkey 387 U.S. 369 (1967), which overturned California's constitutional provision allowing a property owner to consider the race of a buyer or lessee; and Anderson v. Martin, 375 U.S. 399 (1964), which invalidated a statute requiring the designation of a candidate's race on the ballot.

The Court cited the Fifteenth Amendment in setting aside a state law which had changed the municipal boundaries of Tuskegee, Alabama, so that all but four or five of the city's 400 black voters were placed outside the city limits. Gomillion v. Lightfoot, 364 U.S. 339 (1960). The

legislation had been "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote". Id. at 41.

If these precedents applying the Fourteenth and Fifteenth Amendments are to be taken seriously, the Court cannot allow the creation of the two North Carolina majority-minority districts along racial lines and the segregation of black from white voters. Indeed, the black neighborhoods along Interstate 85, which have been purposely gathered into North Carolina's Twelfth Congressional District, are an American version of the black townships under South Africa's apartheid system. - Moreover, although they are whites, Ruth Shaw and Melvin Shimm, the two Appellants registered to vote in that Twelfth District, are in a position like

that of the black voters in <u>Gomillion</u>; they have been purposefully "fenced" out of a district (the Second District) where there is a majority of white voters and "fenced" in a district with bizarre boundaries drawn for the specific purpose of placing in the district enough black voters to assure that a black person will be elected therefrom to the House of Representatives.

This Court has refused to rule heretofore that either the Fourteenth or the Fifteenth Amendment creates a federal constitutional right for a minority group to elect candidates in proportion to its numbers. Thus, in Mobile v. Bolden, 446 U.S. 55, 76 (1980), the plurality opinion rejected the contention that a constitutional right of black voters in

Mobile had been violated "because no Negro has been elected to the Mobile City Commission". The opinion emphasized: "The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization." Id. at 75-76.8 Moreover, the Fifteenth Amendment concerns the right to vote -- rather than to be represented by a person of the voter's own race.

 The <u>Batson</u> Line of Cases Upholds the <u>Principle</u> that the Constitution is "Color-Blind."

Recently the Court has given new life to the ideal of the "color-blind

<sup>&</sup>lt;sup>7</sup>As intended by the Attorney General -- and derivatively intended by the General Assembly -- a black person was elected to Congress in 1992 from each majority-minority district in North Carolina.

In <u>Freeman v. Pitts</u>, 112 S.Ct. 1430, 1447 (1992) the Court commented that, "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." Although this comment was made in the context of school segregation, it seems applicable also to achieving racial balance in the Congress for its own sake.

Constitution" in deciding a series of cases which follow Batson v. Kentucky, 476 U.S. 79 (1976), and involve the race-based use of peremptory challenges in criminal and civil trials. Thus, in Powers v. Ohio, 111 S.Ct. 1364 (1991), the Court ruled that a white defendant could properly invoke equal protection to preclude the prosecutor from peremptorily challenging black jurors because of their race. As the Court explained, Batson had "recognized that a prosecutor's discriminatory peremptory challenges harms the excluded jurors and the community at large." Id. at 1368. The Court rejected the view that

> race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other The suggestion that jurors. classifications racial survive when visited upon all

persons is no more authoritative today than the case which advanced the theorem. Plessy v. Ferguson, ... It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.

Id. at 1370.

Moreover, in upholding in <u>Powers</u> the standing of the white criminal defendant, the Court emphasized that a verdict would not be accepted by a defendant or the community as fair "if the jury is chosen by unlawful means at the outset". <u>Id.</u> at 1372.

In Edmonson v. Leesville Concrete Co.,

111 S.Ct. 2077 (1991), the Court reached a

similar result in ruling on peremptory

challenges in a civil trial. Relying on

the statement in <u>Powers</u> that racial

discrimination in the selection of jurors

"'casts doubt on the integrity of the

judicial process' and places the fairness

of a criminal proceeding in doubt," <u>Id.</u> at 2080. the Court observed:

It may be true that the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its But if race verdicts. stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy jury's themselves of a impartiality without using skin color as a test. society is to continue to progress as a multiracial democracy, it must recognize that automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.

Id. at 2088.

In Georgia v. McCollum, 505 U.S.\_\_\_,

111 S.Ct. 2348 (1992), the Court held that
the Constitution prohibits even a criminal
defendant "from engaging in purposeful
discrimination on the grounds of race in
the exercise of peremptory challenges."
The Court pointed to the need for public

confidence in the integrity of the judicial system; and presumably the Court concluded that meeting this need was even more important than allowing a criminal defendant the unfettered exercise of his Sixth Amendment right to the assistance of counsel.

Important as is the constitutional right to a jury trial, the right to vote is important. Indeed, the "people's" right to vote for members of the House of Representatives -- which has existed since the Constitution was ratified -- is arguably the most important right conferred on American citizens by the Constitution. Therefore, if, in order to maintain confidence in the criminal justice system, a prohibition is imposed on the exercise race-based peremptory challenges by any party to a criminal or civil trial, no justification can exist for

destroying public confidence in integrity of congressional elections by deliberately creating race-based majorityminority congressional districts. creation of such districts is based on the racial stereotype that only a black member of the House of Representatives can properly represent black voters in the Congress. The Court has refused to allow the exercise of a peremptory challenge on the "assumption" that a black juror may be presumed to be partial simply because he is black," Holland v. Illinois, 493 U.S. 474, 484, n.2 (1990).9 Likewise, the Court should vigorously rebuff the effort of the Attorney General and of the North Carolina Legislature to apply racial "assumptions"

to the electoral process.10

 Creation of Majority-Minority Districts Without Race-Neutral Justification May Lead to Further Racial Division.

Under <u>Batson</u> and its successors, a peremptory challenge may be exercised if -- but only if -- a race-neutral explanation is available. Likewise, a congressional district may be created in which a majority

Fiven a criminal defendant cannot base a peremptory challenge on this type of race-based "assumption". Georgia v. McCollum, supra.

Appellants Shaw and Shimm are especially injured by being placed in the Twelfth congressional district, which were created because the Attorney General and the General Assembly relied on a racial stereotype or "assumption" that only a black person can adequately represent in Congress the blacks who constitute a majority of the voters in that district. Thus, the black person elected to Congress from the Twelfth District -- as occurred in November 1992 -- may be led to ignore the interests of the white voters in the district because, according to the same stereotype, his duty is to further the interests of black voters. On the other hand, taking its stereotype to the fullest extent, the white Congressmen who have been from elected the ten congressional districts in North Carolina where whites are in a majority, may view their primary duty to be the furtherance of the interests of their white constituents.

of the registered voters are minority persons; but also in this instance there must be a race-neutral explanation available. North Carolina's redistricting plan is per se unconstitutional because not only is no race-neutral explanation available for the convolutions of the boundaries, but the admitted explanation is that these districts are the result of a race-conscious purpose.

If, as Appellees and the court below apparently believe, the purposeful creation of majority-minority congressional districts like the two in North Carolina is authorized by <u>U.J.O.</u>, that case is a dangerous relic from the past and should now be formally interred. Even Justice Brennan, who joined in a portion of the plurality opinion in <u>U.J.O.</u>, recognized that such redistricting posed several dangers. These dangers have become

increasingly more evident and more serious over the ensuing years.

In U.J.O., Justice Brennan observed that "a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries." 430 U.S. at 172. On December 8, 1992, this hazard posed by race-conscious redistricting was exemplified when opponents of the recent Ohio legislative reapportionment plan argued before this Court in Voinovich v. Quilter, (No. 91-1618), that the plan was the product of such a "policy" and that the "packing" of black voters under that plan actually lessened their influence. Similarly, in the instance of the Brooklyn legislative reapportionment involved in U.J.O., "Puerto Rican groups (lumped together with blacks as 'nonwhite') protested that the result of

the Justice Department's intervention had been to reduce their political strength from what it would have been under the state's initial plan.' (See Andrew Kull, The Color-Blind Constitution, (1992), p.219.)

Justice Brennan also acknowledged in U.J.O. that:

even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears relationship to individual's worth or needs. Furthermore, preferential treatment may act to stigmatize its recipient groups, for although intended systemic correct institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection."

Id. at 173-174.

Creation of the two majority-minority districts in North Carolina was an implicit

affront to blacks because it implied that they are incapable of organizing coalitions to elect favored candidates of whatever race. Cf. De Funis v. Odequard, 416 U.S. 312, 343 (1974) (Douglas, J. dissenting). Ironically, this implication is false, for black candidates have been increasingly successful in obtaining election to State and local office.

Finally, according to Justice Brennan,

especially when interpreting the broad principles embraced by the Equal Protection Clause, we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most and insular" "discrete whites often will be called upon to bear immediate, direct costs of benign discrimination.

Id. at 174.

Certainly Appellants Shaw and Shimm entertain this "impression of injustice" to which Justice Brennan refers. They and other registered white voters in the Twelfth District feel victimized by having been placed in a majority-minority district drawn with irrational boundaries in order to assure that a white person will not be elected to Congress from that district. They realize that, for the next ten years, their representative in Congress will be black and will consider his primary duty to be the representation of blacks, because that is the very purpose for which the district was created. 11 Moreover, these

Appellants, like many other North Carolina voters -- white and black -- have suffered injury because the lack of compactness, contiguousness, and community of interest in their congressional districts makes it almost impossible for their Representative -- however well-intentioned he may be -- to adequately to represent them.

The majority-minority districts also do great harm to our national goal of an integrated society for a

racial entitlement to congressional seats is a disincentive for achieving a truly integrated society. In such a society, not even the cleverest computer program could gather blacks (or Hispanics, or any other group) into a district where they are a majority. Imagine, says the newspaper Roll Call, creating a district for twenty-year-olds, and you'll begin to understand the problem.

Will, supra, at 49.

The evils that may result from racial quotas in the electoral process are not of themselves a complete justification for

<sup>11</sup> One can only speculate whether white members of Congress elected from other districts will feel any obligation to represent white voters not in their district. Likewise, a black person who wishes to be a candidate from a district which is not a majority-minority district may confront a "backlash" feeling among the white voters of that district that the blacks in North Carolina already have their "share" of seats in the Congress.

holding such quotas to be constitutionally invalid. Nonetheless, they tend to substantiate the argument that the purposeful creation of majority-minority congressional districts -- if it were ever authorized by <u>U.J.O.</u> or any other decision of the Court -- is constitutionally prohibited in the 1990's.<sup>12</sup>

Citing a passage in <u>U.J.O.</u>, 13 the

court below concluded that Appellants, who are all white, had not been injured, because North Carolina's redistricting plan "demonstrably will not lead to proportional underrepresentation of white voters on a statewide basis". (J.S. App. at 23a-24a) However, in U.J.O., there was no majority opinion and the constitutionality of proportional representation by race should not rest on a plurality opinion. Secondly, U.J.O. did not involve elections for members of the United States House of Representatives -- elections which, as the "one-person, one-vote" cases make clear, are entitled to even greater constitutional protection than elections state

<sup>12</sup> In Freeman v. Pitts, 112 S.Ct. 1430 (1992), the Court made clear that even though a program of affirmative action to combat school segregation may initially been constitutionally allowable, at some point the justification for the program may cease. Even if, at some point North Carolina's history, majority-minority establishment of districts might have been permitted, currently they have no constitutional The redistricting plan justification. generated by the Attorney General and the North Carolina General Assembly was obsolete at its birth and certainly should not be upheld now by the Court -- in which event it will predictably remain in effect until the next decade, the next century, and the next millennium.

<sup>13 &</sup>quot;As the Court of Appeals observed, the plan left white majorities in approximately 70% of the assembly and

senate districts in Kings County, which had a countywide population that was 65% white. Thus, even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population." 430 at U.S. 166.

legislators.14 Most important, insofar as it purports allow proportional to representation U.J.O. by race, inconsistent with the recent invalidating race-conscious government actions.

> C. The Voting Rights Act Does Not Provide a Basis for Race-Based Proportionate Representation in the United States House of Representatives

In amending Section 2 of the Voting Rights Act in 1982, Congress enacted a specific proviso that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the

population." 42 U.S.C. § 1973b. Thus, it made clear the legislative intent not to recognize any right of minority groups to proportional representation. See S.Rep. No. 97-417, p.2 (1982), quoted in footnote 20 of Chisom v. Roemer, 111 S.Ct. 2354, (1991). Clearly, in light of the proviso, the Attorney General is not empowered to establish such a right on his own. Cf. Presley v. Etowah County Commissioners, 112 S.Ct. 820 (1992) (rejecting Attorney General's construction of Voting Rights Act provision).

Despite the express proviso in Section 2 of the Voting Rights Act, 42 U.S.C. 1973b, Appellees apparently contend that, under <u>U.J.O.</u>, the creation of North Carolina's two majority-minority districts is a form of "benign discrimination" which may be required by the Attorney General in the exercise of his preclearance powers

Thus, in the reapportionment of state legislatures or county boards, the Court has been willing to allow a much greater deviation from equality of voters than would be allowed in congressional redistricting. Compare Karcher v. Daggett, 462 U.S. 729 (1983) with Brown v. Thompson, 452 U.S. 835 (1983) and Abate v. Mundt, 403 U.S. 182 (1971).

under Section 5 of the Voting Rights Act.

However, no constitutional basis exists for

Congress to authorize legislation having

such an effect.

When construed in light of Article I, Section 2, the power conferred on Congress by Article I, Section 4 does not include the imposition of a system of racially proportionate representation in the House Fifteenth The Representatives. Amendment concerns the personal right to vote, rather than any group right to representation in the Congress or other The imposition of legislative body. racially proportionate representation in the House of Representatives is outside the purview of Section 1 of the Fifteenth Amendment and, therefore, beyond any authority Congress might have under Section 2 -- which has generally been viewed as the primary source of congressional power to enact voting rights legislation. Likewise, a law intended to create proportionate representation by race in the House of Representatives would not be "appropriate legislation" within the meaning of Section 5 of the Fourteenth Amendment -- unless the Court takes a new position and decides that the right to vote includes a right to have a candidate elected of the voter's race.

In view of this lack of congressional power to impose proportionate representation by race, there is even greater reason to construe the Voting Rights Act in a way that will not permit the unconstitutional result of allowing the Attorney General to impose a quota system for voting which demeans the race it purports to protect, in many instances dilutes the overall influence of minorities in the political process, and destroys the ideals of our democratic society.

### II. NORTH CAROLINA'S TWO MAJORITY-MINORITY DISTRICTS FLUNK THE "STRICT SCRUTINY" TEST.

Even if the Constitution allowed racial group entitlements to seats in Congress, those entitlements should not be awarded without strict scrutiny to determine what abuse they remedy and what need they fulfill.

This conclusion is supported by the Court's decision in Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d (1989), 854 which held unconstitutional a racial set-aside program for municipal public contracts. There the Court emphasized the lack of relationship between the beneficiaries of the set-asides and the racial discrimination which was the purported justification for the program. According to the majority in Croson, "strict scrutiny" should be given to the alleged reason for granting such racial quotas. Thus, the lesson is clear that if the purposeful creation of two districts to elect black members of Congress can be justified at all, that justification must be substantial. 15

<sup>15</sup> The Court's decision in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), does not invalidate this conclusion. Although there the Court upheld racial preferences in the allocation or distress sale of broadcast licenses, these preferences fall short of being quotas. Moreover, such preferences were viewed by the Court as having received congressional approval because of a policy favoring expression of diverse views through the broadcast media; but North Carolina's racial quotas for members of Congress -- especially as implemented by the General Assembly in the redistricting plan -- violate the legislative intent expressed by the proviso in Sec. 2 of the Voting Rights Act, 42 U.S.C. § 1973b. Some conceivable benefit to members of an economically disadvantaged group may result from obtaining a broadcast license; but no comparable benefit to any voter accrues from the creation of majority-minority districts. Most important, in any event, broadcast licenses authorized by Congress in the exercise of its commerce power, Art.I § 8, cl. 3, do not have the same constitutional status as the right to vote for members of the House

A. This Court's Recent Decision in <u>Freeman</u> Indicates that Strict Scrutiny Must Be Given to Majority-Minority Districts.

Although it deals with school desegregation, rather than voting rights, the Court's recent decision in Freeman v. Pitts, supra, supports the conclusion that efforts to attain racial balance must be justified and subjected to strict scrutiny. There, in allowing the District Court to return partial control of the Atlanta school system to local authorities, this Court explained that

judicial powers may be exercised only on the basis of a constitutional violation . . . the nature of the violation determines the remedy.... A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation. 112 S.Ct.

at 1445.16

Although this language was for the guidance of Federal judges administering desegregation plans, it would seem equally applicable to the exercise of the Attorney General's preclearance power.

In <u>Freeman</u> the Court also noted that the Court of Appeals had erred in ruling that the District Court was required to use "awkward", "inconvenient", and "even bizarre" measures to achieve racial balance in student assignments, when the racial imbalance was not attributable to the prior de jure system but rather to "independent demographic forces", 112 S.Ct. at 1447.17

Representatives, which is specifically conferred on "the people" by the Constitution itself. See Art. I, § 2.

<sup>16</sup> The Court also stressed that the end purpose must be to remedy the violation and "to restore state and local authorities to the control of a school system that is openly in compliance with the Constitution." Ibid.

<sup>&</sup>quot;Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once

These comments seem quite applicable to the effort by the Attorney General to compel North Carolina officials to enact a "bizarre" redistricting plan.

Up to this point, no one has attempted to demonstrate any relationship between North Carolina's 1992 redistricting plan and any past constitutional violation by the State. Likewise, no "strict scrutiny" has been given to whether having two majority-minority districts for the next decade is a remedy for any abuse or whether this solution creates many new problems.

Whatever the conditions that led the Attorney General some years ago to

determine that 40 counties in North Carolina should be subject to the preclearance requirements of Section 5 of the Voting Rights Act, there has been no judicial or administrative determination, or even any suggestion, that those conditions have any relationship to North Carolina's failure to send a black person to Congress.

The 1990 census reveals that the State's black population -- which is about 22% -- is dispersed extensively across both rural and urban areas. 18 In only five counties does the black population exceed the white. Those counties -- Bertie, Edgecombe, Hertford, Northampton, and Warren -- do not have large populations. Because of the State's "residential"

the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic forces." (Id. at 1447). "Where reorganization is a product not of state action but of private choice, it does not have constitutional implications." (Id. at 1448).

<sup>&</sup>lt;sup>18</sup> Appellants have lodged ten copies of the 1990 census information with the Clerk of the Court; and the Court is requested to take judicial notice thereof.

patterns", there is no opportunity to create compact congressional districts in North Carolina in which blacks will be in the majority. See <u>U.J.O.</u>, 430 U.S. at 168.

history, its congressional districts have been reasonably compact and contiguous. 19
Until 1992, the only obvious gerrymandering of these districts occurred when, in the wake of Baker v. Carr, supra, the General Assembly adopted a redistricting plan for the 1966 election. In turn, a three-judge District Court invalidated this plan on one-person, one-vote grounds and ordered the State to adopt a new plan whereunder the congressional districts would be

"compact and contiguous".20

In short, no evidence exists that heretofore any racial gerrymandering has taken place in North Carolina in establishing congressional districts. Even though North Carolina heretofore has had no black member of Congress in this century, there is no indication that this resulted from the shape of the Congressional districts or that the North Carolina Legislature has ever considered race in the drawing of congressional districts.

On the other hand, the voters of North Carolina have shown ever-increasing willingness to elect their public officials without regard to race. In the 1992 election a black male, Ralph Campbell, was

showing the Congressional districts in North Carolina from the State's beginning up to the present. Appellants have lodged ten copies of these maps with the Clerk of Court; and the Court is requested to take judicial notice thereof.

See, <u>Drum v. Seawell</u>, 249 F.Supp. 988 (M.D.N.C. 1966), aff'd 383 U.S. 831 (1966). Ruth Shaw, one of the present Appellants, was among those who successfully attacked the 1966 redistricting plan.

elected to be State Auditor. In 1990 a black male, Harvey Gantt, defeated a white opponent in the runoff in the Democratic Primary for the United States Senate and almost defeated a powerful white Republican incumbent, Jesse Helms, in the general election. One of the Defendant-Appellees, Daniel T. Blue, Jr., is black and is the Speaker of the North Carolina House of Representatives; and another Appellee, William A. Marsh, Jr., who is black, now chairs the North Carolina State Board of Elections. Although one election would not be conclusive, cf. Thornburg v. Gingles, 478 U.S. 30, 51 (1986), in North Carolina there is a substantial "track record" of black influence in the political process.

> B. The Majority-Minority Districts Cannot Satisfy the <u>Gingles</u> Criteria.

In <u>Gingles</u>, the Court prescribed three "necessary preconditions for multi-member voters' ability to elect representatives of their choice," <a href="id.">id.</a> at 500. The first condition was that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." Presumably the Court also meant that "a single-member district" should be formed with some regard for compactness, contiguousness, and other principles usually applied in creating legislative districts.

As revealed by the census data, in North Carolina the black population is too dispersed to permit the creation of two majority-minority districts with rational boundaries. Indeed, the bizarre boundaries of the Twelfth congressional district corroborate that, because of the size and dispersion of North Carolina's black

population, it is impossible to create a majority-minority congressional district without abandoning all other principles of districting.

The second <u>Gingles</u> condition is that the minority group must be politically cohesive. Appellants are unaware that either the Attorney General or a court has found that this condition exists in North Carolina; but whether it does is immaterial since the other conditions are not.

The third condition concerns absence of "cross-over" by members of the majority group. At least currently, this condition is not met, for in various North Carolina elections there has been a substantial "cross-over vote" by the whites who form 76% of the State's population. Otherwise, with only 22% of the population, blacks could not have enjoyed their election

successes in North Carolina.21

In any event, <u>Croson's</u> principle of "strict scrutiny" of racial quotas would require that race-based congressional redistricting not take place until there has been a determination that the <u>Gingles</u> conditions have been met. Appellants believe that neither the Attorney General nor the General Assembly have made any such determination and that no one has even attempted to show that the <u>Gingles</u> conditions apply.

Insofar as U.J.O. is thought to

<sup>21</sup> The remaining 2% of the State's population is predominantly Native-American. To follow the Attorney General's approach to its logical conclusion would suggest that in every fifth congressional election there should be redistricting to create for that election a majorityminority district of Native-Americans who could then elect a Native-American to serve a term in the Congress. This would more fully assure proportionate representation and help cure the "defect" caused by the failure heretofore of the State to send a Native-American the House Representatives.

produce a different result, attention should be accorded to that portion of the plurality opinion which stated that

think it also permissible for State, employing sound districting principles such as compactness and population equality prevent racial minorities from being repeatedly outmoded by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority. (Emphasis Supplied)

430 U.S. at 168.

1977, in This language, used anticipates in some respects the Gingles conditions. If, because of the numbers and the "residential patterns" of the black population in North Carolina, it is infeasible to create majority-minority violating "sound districts without districting principles such as compactness and population equality", then U.J.O. does

not authorize the creation of such districts.

Appellants have several other observations about <u>U.J.O.</u> First, just as it violates the concept of a "color-blind Constitution," <u>U.J.O.</u> is out of step with cases like <u>Croson</u> which require "strict scrutiny" for any kind of quota. Secondly, the elections involved in <u>U.J.O.</u> were for the New York legislature. They were not elections of members of the United States House of Representatives -- as to which the Constitution makes specific provision and contains special safeguards.<sup>22</sup>

A final distinction of <u>U.J.O.</u> is that it dealt with the apportionment of Kings County, New York, which was subject to Section 5 of the Voting Rights Act because

n.14, the one-person, one-vote requirement applies much more strictly to congressional elections than to the election of State legislators.

it had not made Spanish language ballots available. On the other hand, Durham County, where all five Appellants reside, is not among the 40 counties in North the preclearance Carolina which requirements of Section 5 apply. Moreover, Durham is the very county as to which the Court ruled in Gingles that the lower court had erred by ignoring the sustained success of black voters in electing members of the State House of Representatives. This success continues in Durham County up to the present.23 Nonetheless, Durham County is one of those counties divided by the "serpentine" Twelfth Congressional District, which "gobbles up" black neighborhoods.

Even under its most expansive reading, Gingles should not be construed to authorize such a result. If Appellants and other registered voters in Durham County are to be subjected to a redistricting plan which will place them for the next ten years in a district with bizarre boundaries intended to assure that any member of Congress elected therefrom will be black, the justification, if any, for this plan should first be subjected to "strict scrutiny" by the Attorney General, the General Assembly, and the courts. require anything less than this in dealing with an important personal right conferred by the Constitution and yet to insist on "strict scrutiny" for racial "set-asides"

election, Durham County has been governed by a board of five county commissioners, of whom three, including the chairman, are black. Of the three members of the State House of Representatives from Durham County, one has been black for many years. Of the two Senators from the district in which Durham County is located, one has been black for many years. The City of Durham, which contains a substantial majority of Durham County's population, has had a black mayor in the recent past and also, for some years, has had several black members on its City Council.

in public contracts would be an anomaly.

Only if the Court grants relief to

Appellants can this anomaly be prevented.

# III. THE LEGISLATURE'S DISCRIMINATORY INTENT WAS "INVIDIOUS"

In cases in which relief for racial gerrymandering has been sought under the Fourteenth or Fifteenth Amendments the Court frequently required the has plaintiffs to establish that an "invidious" discriminatory intent existed. See, e.g. Mobile v. Bolden, supra, at pp. 66-67. In U.J.O., New York defended on the ground that its legislative reapportionment of Kings County was designed to meet the requirements imposed by the Attorney General and to assure compliance with the Voting Rights Act. In the present appeal, the Court has now raised the issue of whether the State Appellees are entitled to a similar defense. If this defense is allowed, the result will be to create a

"Catch-22" situation and thereby leave Appellants and other registered voters in similar situations without any legal remedy for egregious violations of their most important personal right in a democratic society.

The injury to Appellants and to other registered voters was initiated by the Attorney General's decision to require that North Carolina have two majority-minority congressional districts. This decision, which was made without any study or scrutiny by the Attorney General, was contrary to Section 2 of the Voting Rights Act and to Article I, Section 2 and the Fifth and Fifteenth Amendments of the Constitution, because the purpose of this Federal officer was to establish a racial quota of two black members of Congress from North Carolina. Therefore, the Attorney General's decision was made with an

"invidious" discriminatory intent, for, as Justice Douglas once explained, any state-sponsored preference to one race over another is "invidious". De Funis v. Odegaard, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting).

When Appellants made the Attorney General and Assistant Attorney General Dunne parties-defendant in their suit to challenge the redistricting plan, the Federal Appellees moved to dismiss. They successfully contended that, under the preclusion language of the Voting Rights Act, 42 U.S.C. 19731(b), as interpreted by the Court in Morris v. Gressette, 432 U.S. 491 (1977), the decision by the Attorney General was completely nonreviewable in any kind of suit that could be brought by Appellants or any other injured registered

voters.<sup>24</sup> Thus, the only way to test the legality of the Attorney General's requirement would be a suit filed by the State of North Carolina in the United

<sup>24</sup> The issue whether the Attorney General could be sued by registered voters was left open in U.J.O. 430 U.S. at 154, n.13. However, the sweeping position of the Federal Appellees is not justified by the preclusion language of § 19731(b), which refers to injunctive relief and does not mention declaratory relief of the type which Appellants are seeking in their Complaint, as amended. In view of "the strong presumption that Congress intends judicial review of administrative action," see Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1980), any congressional intent to prevent judicial review should be made clear. Johnson v. Robison, 415 U.S. 361 (1974); Weinberger v. Salfi, 422 U.S. 749 (1975). Indeed, to accept the broad construction of § 19731(b) relied on by the Federal Appellees raises a "serious constitutional question". Webster v. Doe, 485 U.S. 592, 603 (1988). Moreover, the Federal Rules of Civil Procedure authorize joinder of all parties necessary to assure the relief sought in an action. Unless the Attorney General is a party to an action which contests the constitutionality of a requirement imposed by the Attorney General, he or she can continue to deny preclearance of a plan that does not comply with that requirement and can thereby impede the obtaining of full relief.

States District Court for the District of Columbia.

By their Motion to Dismiss based on U.J.O., the State Appellees have contended that they cannot be sued, because they were simply trying to comply with the Voting Rights Act by acquiescing in the Attorney General's requirement. Even though the State could have sought to avoid this requirement by instituting an action before a three-judge district court in the District of Columbia, this alternative would have involved expense and delay; and so it was not really feasible. According to the State Appellees, their good faith in trying to comply with the Voting Rights Act precludes a court from finding that the race-based legislation was enacted with an "invidious" discriminatory intent.

The result of Appellees' syllogism is that Appellants -- no matter how great the

injury they have suffered -- can obtain no injunctive or declaratory relief for the invasion of their constitutional rights. Thus, for the next decade they will be compelled to endure patiently the painful situation in which they now find themselves.

The Appellees' logic leads to the wrong conclusion, however, because it is founded on a false premise in its interpretation of the term "invidious".

Just as the Attorney General's intent was "invidious" because he purposely attempted to establish a racial quota, the intent of the General Assembly was "invidious" when, in deference to the Attorney General, it also acted in a race-conscious manner to create two majority-minority districts for the purpose of assuring that two black persons were elected to Congress from those districts.

Such an interpretation of "invidious" is consistent with the principle underlying the <u>Batson</u> line of cases, which hold that a peremptory challenge cannot be exercised against a juror because of that juror's race. Even a criminal defendant or his counsel is not allowed to challenge a juror peremptorily on grounds of race although the defendant may have a good-faith belief or "assumption" that the chances for acquittal will be greater if the challenged juror does not sit.

Peremptory challenges, however, may be exercised for a race-neutral purpose -such as the jurors' prior knowledge about the case of their personal acquaintance with the witnesses -- even though this may result in excluding from a jury all the members of a particular race. Cf. Holland v. Illinois, 493 U.S. 474, (1990). The line of demarcation is like that which the

Model Penal Code makes between action taken "purposely" and action taken "knowingly" -the former usually being more culpable.
See American Law Institute Model Penal Code
(Official Draft 1962), § 2.02.

if congressional Similarly, redistricting is done for the specific purpose of assuring that a congressional district will elect a representative who is of a particular race, the redistricting is done with an "invidious" discriminatory intent. It makes no difference whether the chosen race is black, white, Native-American, Hispanic, or Asian-American. On the other hand, if a legislature creates a district because of compactness, contiguousness, geographical boundaries, community of interest, or other factors, it is immaterial that a majority of a particular race resides or is registered to vote in that district and that the voters

probably will elect a person of that race to serve in the Congress.

From this viewpoint, the Attorney General's requirement of two majority-minority districts was imposed on North Carolina with an "invidious" discriminatory intent. By acting to implement that requirement -- rather than resisting it to the utmost -- the General Assembly acted "purposely" and thus with an "invidious intent.

There is nothing incongruous about this interpretation of "invidious" which precludes Appellees' good faith defense. Perhaps that defense would have more merit if Appellants were seeking damages in tort against Appellees, rather than only injunctive and declaratory relief.

Appellants' interpretation of "invidious" intent to include purposeful action also prevents an absurd result that

would occur from acceptance of Appellees' contentions. If the Appellees are corect, the Attorney General would have a de facto power to expand the coverage of the Voting Rights Act, even though this Court has made clear that -- whatever respect may be due his views -- the decisions of the Attorney General as to the scope of this Act are not binding, cf. Presley v. Etowah County, supra. Whenever a state decided to accept a requirement for preclearance imposed by the Attorney General -- no matter how outrageous that requirement might be -- any registered voter who sought judicial relief would be confronted by a good faith defense and thrown out of court. procedural rules or strained constructions to become a means for depriving citizens of important constitutional rights does not accord with this Court's recent

jurisprudence.25

The question posed by the Court for briefing inquires as to the effect of failure by the State legislature to accede to the plan suggested by the Attorney General. As Appellants have sought to demonstrate, the action of the State Appellees violated several constitutional provisions, because it was undertaken for the purpose of assuring that -- as Federal officials had demanded -- two black persons would be elected to Congress from North Carolina.

Under such circumstances, any requisite "invidious" discriminatory intent was present whether or not the State

Appellees accepted fully a redistricting plan suggested by the Attorney General. 26 It sufficed that these Appellees chose to establish proportionate representation by race in the North Carolina congressional delegation. Nonetheless, rejection of a plan suggested by the Attorney General brings more into question whether the State Appellees really were acting in good faith -- especially when the result of their efforts was as bizarre and irrational as the redistricting plan that was finally enacted by the General Assembly.

#### CONCLUSION

The redistricting plan and the official action which led to its enactment

supra, one reason for upholding a white defendant's standing to challenge the prosecutor's use of peremptory challenges to exclude black jurors was the Court's recognition that otherwise the rights of black jurors to serve would be unprotected, because it would be infeasible for those jurors to sue in their own right.

whether Congress intended for the Attorney General to be suggesting to State officials a plan which he would be willing to preclear. However, Appellants also recognize that in discussions between State and Federal officials the latter might take a broader view of their authority than Congress had ever anticipated.

violate some of the most basic precepts of American democracy. "Purposely" drawing racial lines in defining Congressional districts violates Article I, Section 2 and the Fourteenth and Fifteenth Amendments of the Constitution -- even if this is done purportedly as a remedial measure. However, in North Carolina there had been no related constitutional abuse to be remedied; and the previous absence of black members of Congress from North Carolina resulted not from racial gerrymandering but from minority population dispersion. The purposeful action of the Federal and State Appellees took place with an "invidious" racially discriminatory intent. No good faith defense is available -- whether or not the State Appellees complied with any plan suggested by the Attorney General.

The judgment of the Court below should be reversed; and, since the material facts

are undisputed, the Court should hold that the North Carolina redistricting plan is unconstitutional and should be redrawn.

Respectfully submitted,

Robinson O. Everett
Counsel of Record
Everett, Gaskins, Hancock &
Stevens
300 FUNB Building
301 West Main Street
Durham, North Carolina 27702
(919) 682-5691

Jeffrey B. Parsons
Everett, Gaskins, Hancock &
Stevens
127 West Hargett Street
Raleigh, North Carolina 27602
(919) 755-0025

Counsel for Appellants

January 21, 1993

# In the Supreme Court of the United States

OCTOBER TERM, 1992

RUTH O. SHAW, ET AL., APPELLANTS

U.

STUART M. GERSON, Acting Attorney General, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

### BRIEF FOR THE FEDERAL APPELLEES

WILLIAM C. BRYSON
Acting Solicitor General
JAMES P. TURNER

THOMAS G. HUNGAR
Assistant to the Solicitor General

Acting Assistant Attorney General

JESSICA DUNSAY SILVER
IRVING GORNSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

### QUESTION PRESENTED

The Court noted probable jurisdiction and directed that argument would be limited to the following question, which the Court directed all parties to brief:

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-357

RUTH O. SHAW, ET AL., APPELLANTS

v.

STUART M. GERSON, Acting Attorney General, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

# BRIEF FOR THE FEDERAL APPELLEES

### OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-60a) is reported at 808 F. Supp. 461.

### JURISDICTION

The judgment of the three-judge district court (J.S. App. 61a-63a) was entered on April 27, 1992. A notice of appeal was filed on May 27, 1992. J.S. App. 64a-66a. The jurisdictional statement was filed on August 25, 1992, and probable jurisdiction was noted on December 7, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

# PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment and Section 1 of the Fifteenth Amendment to the Constitution of the United States are set forth at pages 3-4 of appellants' opening brief. The relevant provisions of the Voting Rights Act of 1965, 42 U.S.C. 1973, 1973c, are set forth at App., *infra*, 1a-3a.

### STATEMENT

1. Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, provides that when a State or political subdivision with a history of voting discrimination, as defined in 42 U.S.C. 1973b(b) (a "covered jurisdiction"), seeks to alter its "standard[s], practice[s], or procedure[s] with respect to voting," it must obtain authorization to do so in one of two ways. It must either obtain a declaratory judgment from the United States District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. 1973c, or it must obtain administrative preclearance from the Attorney General.

When a covered jurisdiction submits a proposed change in electoral practices or procedures to the Attorney General for administrative preclearance, the Attorney General may interpose an objection within 60 days, in which case the covered jurisdiction is precluded from implementing the change unless it seeks and obtains declaratory relief in the United States District Court for the District of Columbia. 42 U.S.C.

1973c.¹ If the Attorney General determines not to interpose an objection, the covered jurisdiction may then implement the proposed change, although the Attorney General's failure to object does not bar a subsequent action to enjoin enforcement of the practice or procedure. *Ibid.* This Court has held that a legislative redistricting plan constitutes a change in a "practice[] or procedure with respect to voting" within the meaning of Section 5. *McDaniel v. Sanchez*, 452 U.S. 130, 137-138 (1981); *Beer v. United States*, 425 U.S. 130, 133 (1976); see also *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) (opinion of White, J.); accord 28 C.F.R. 51.13(e).

2. The State of North Carolina is entitled to 12 seats in the United States House of Representatives. J.S. App. 2a. In July 1991, the North Carolina General Assembly enacted a redistricting plan for the State's 12 congressional seats. *Ibid.* That plan included one district in which blacks constituted a majority of the voting age population (VAP). *Ibid.* 

Because 40 of North Carolina's 100 counties are covered jurisdictions for purposes of Section 5 of the Voting Rights Act, the State submitted its redistricting plan to the Attorney General for administrative preclearance under Section 5. J.S. App. 3a. On December 18, 1991, the Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, interposed an objection to the plan. *Ibid.*; see App., *infra*, 4a-12a.

The Attorney General's objection letter began by noting that the district lines in the south-central to

<sup>&</sup>lt;sup>1</sup> A jurisdiction may also request that the Attorney General reconsider the decision to object to a proposed change. 28 C.F.R. 51.45.

southeastern part of the State "appear[ed] to minimize minority voting strength given the significant minority population in this area of the state." App., infra, 10a; J.S. App. 3a. Specifically, it appeared that the State "chose not to give effect to black and Native American voting strength in this area," even though "boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state." App., infra, 10a; J.S. App. 3a-4a.

The letter also noted that the State "was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina." App., infra, 10a; J.S. App. 4a. It pointed out that the Department of Justice had reviewed several alternative plans providing for a second majority-minority district in the southern part of the State, at least one of which had been presented to the General Assembly. App., infra, 10a; J.S. App. 4a. The letter stated that the alternative plans, and other variations identified in the Department's analysis, "appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons." App., infra, 10a-11a; J.S. App. 4a.

In response to the Attorney General's objection, the State's General Assembly enacted a revised redistricting plan in January 1992. J.S. App. 4a. That plan includes two districts in which blacks constitute a VAP majority. *Ibid*. The second of those districts,

District 12, consists of a narrow band of urban population concentrations along Interstate 85 between Durham and Gastonia. *Id.* at 4a-5a.<sup>2</sup>

District 12 is "some 160 miles long" and is "sometimes no wider than" Interstate 85 itself. J.S. App. 4a-5a. Because of the configuration of District 12, "many precincts, counties, and towns in North Carolina are divided among two or even three congressional districts." *Id.* at 5a. In deciding to create this district, the district court explained, "the Democratically controlled General Assembly rejected plans offered by both Republicans and nonpartisan groups for locating the second majority-minority district in the south-central to southeast part of the state." *Id.* at 5a n.3.

Blacks constitute approximately 22 percent of the total population and 20 percent of the VAP of North Carolina. App., infra, 15a, 16a. Under the State's plan, blacks constitute approximately 53 percent of the VAP in each of the two majority-minority districts. Id. at 16a. They constitute between 14 percent and 21 percent of the VAP in six other districts. Ibid. And they constitute less than 9 percent of the VAP in the four remaining districts. Ibid. Whites constitute approximately 76 percent of the total population and 78 percent of the VAP of North Carolina. Id. at 15a, 16a. Under the State's plan, whites are a

<sup>&</sup>lt;sup>2</sup> The State's preclearance submission indicates that the population of District 12 is predominantly urban; 80 percent of the residents in District 12 live in cities with populations of 20,000 or more. In contrast, the other majority-minority district—District 1—is predominantly rural. More than 80 percent of the residents of that district live outside cities with populations of 20,000 or more.

voting majority in 10 (or 83 percent) of the 12 congressional districts. *Id.* at 16a.

The State submitted its revised redistricting plan to the Attorney General for preclearance under Section 5. The Attorney General did not interpose an objection to the revised plan. App., *infra*, 13a-14a.

3. Thereafter, appellants, who are five white voters residing in either District 12 or District 2 (J.S. App. 5a, 18a), brought suit in the United States District Court for the Eastern District of North Carolina challenging the validity of the State's revised congressional redistricting plan.3 Specifically, appellants alleged that the Attorney General and the Assistant-Attorney General for the Civil Rights Division (the federal appellees), in furtherance of their erroneous belief "that the Voting Rights Act requires the creation of districts containing a majority of minority persons \* \* \* to assure the election of minority persons as members of Congress," had unconstitutionally and without legal authorization "coerced the State of North Carolina into creating two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota for representation \* \* \* in the United States House of Representatives." J.S. App. 85a, 88a, 90a. In addition, appellants alleged that the State had "submitt[ed]" to this unconstitutional coercion, thereby becoming "an unwilling, but necessary, participant in creating a racially discriminatory voting process." *Id.* at 93a.

Appellants further alleged that the actions of the federal and state appellees in intentionally drawing two majority-minority districts deprived appellants and all other citizens of North Carolina of their right "to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of the race or color of the voters." J.S. App. 89a-90a. Appellants claimed that the actions of the federal appellees violated their rights under Article 1, Sections 2 and 4 of the Constitution; the Privileges and Immunities Clause: the Due Process Clause of the Fifth Amendment; and the Fifteenth Amendment, J.S. App. 70a. Appellants claimed that the actions of the state appellees violated their rights under Article 1. Sections 2 and 4 of the Constitution; the Equal Protection Clause of the Fourteenth Amendment; and the Fifteenth Amendment, J.S. App. 70a.

As relief, appellants sought a declaration that the State's existing plan is unconstitutional and an injunction against its enforcement. J.S. App. 96a, 98a. In addition, they sought an order directing the State to prepare a new plan that "will not concentrate in any Congressional district persons of a particular race \* \* \* in a manner that is totally unrelated to considerations of compactness, contiguousness, and geographic or jurisdictional communities of interest." Id. at 96a-97a. Appellants also sought an injunction preventing the Attorney General from requiring the creation of such districts as a condition of preclearance. Id. at 95a-96a.

4. The three-judge district court dismissed appellants' claims against the federal appellees for want

<sup>&</sup>lt;sup>3</sup> A second lawsuit challenging the plan was filed by other plaintiffs. J.S. App. 5a n.3. Those plaintiffs alleged that the State's rejection of a majority-black district in the southern portion of the State in favor of District 12 was the result of political gerrymandering motivated by the desire to protect Democratic incumbents. *Ibid.* A three-judge court dismissed that suit, *ibid.*, and this Court summarily affirmed. *Pope* v. *Blue*, 113 S. Ct. 30 (1992).

of jurisdiction and for failure to state a claim. J.S. App. 7a-12a. The court held that only the United States District Court for the District of Columbia has jurisdiction to enjoin actions of the Attorney General taken under Section 5 (J.S. App. 9a-11a), and that no court has authority to review the Attorney General's preclearance decisions (id. at 11a-12a).

The district court also dismissed appellants' claims against the state appellees for failure to state a claim. The court deemed the Equal Protection Clause to be "the only relevant, or most inclusive," source of law in determining the validity of race-conscious redistricting. J.S. App. 14a. The other provisions cited by appellants, the court held, either afford no protection against race-conscious redistricting or provide no more protection than the Equal Protection Clause. *Id.* at 14a-16a & nn.6, 7.

The court next rejected appellants' claim that the Equal Protection Clause requires color-blind redistricting. J.S. App. 18a-21a. The court concluded that this claim was "flatly foreclosed" by this Court's decision in United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) [hereinafter UJO], in which this Court upheld the State of New York's deliberate creation of several majorityminority districts. J.S. App. 18a-19a. The district court noted that while there was no majority opinion for the Court, seven of the eight Justices who participated in UJO had expressly or implicitly rejected the argument that the use of race in formulating district lines is unconstitutional per se. Id. at 19a n.8. The court further held that subsequent decisions by this Court do not east doubt on that holding. Id. at 20a-21a.

Finally, the district court rejected appellants' narrower claim that the State's revised redistricting plan .

is unconstitutional because the State created two racially gerrymandered districts in order to ensure proportional representation for blacks without regard to considerations of compactness, contiguousness, and communities of interest. J.S. App. 21a-24a. Under UJO, the court held, whites challenging a redistricting plan must allege and prove that the plan "was adopted with the purpose and effect of discriminating against white voters \* \* \* on account of their race." Id. at 22a-23a. The court further explained that the "requisite intent \* \* \* is a legislative intent to deprive white voters, including plaintiffs, of an equal opportunity with all other racial groups of voterson a statewide basis-to participate in the political process and to elect candidates of their choice." Id. at 23a. Because appellants alleged only that the State intended to favor black voters in order to comply with the Voting Rights Act, the court concluded that appellants had failed to allege the necessary "invidious" intent. Ibid.

The court also held that appellants had failed to allege "the requisite unconstitutional effect." J.S. App. 23a. The court reasoned that the State's plan "demonstrably will not lead to proportional underrepresentation of white voters on a statewide basis." Id. at 23a-24a. Accordingly, the court concluded that the "mere fact" that white voters in District 12 may not be able to elect candidates of their choice "is not a cognizable constitutional" injury. Id. at 24a.

5. Judge Voorhees dissented in part. He agreed that the court lacked jurisdiction to decide appellants' claim against the Attorney General. J.S. App. 27a. He also agreed that race-conscious redistricting is not unconstitutional per se. Id. at 36a. He con-

cluded, however, that a State may not necessarily use race in redistricting to the exclusion of "sound districting principles" such as compactness, contiguity, communities of interest, residential patterns, and population equality. Id. at 39a-40a; see generally id. at 36a-44a. In addition, Judge Voorhees noted that the State had "rebuffed" the proposal to create a majority-minority district in the southern part of the State (id. at 42a-43a), and he observed that the State's decision to shift the majority-minority district to the area along the highway "could be indicative of a racial animus" against white voters assigned to the highway district. Id. at 44a. Judge Voorhees concluded that the facts alleged in the complaint, taken together, were sufficient to "augur a constitutionally suspect, and potentially unlawful, intent on the part of the State Defendants." Id. at 43a. Accordingly, dismissal for failure to state a claim was, in Judge Voorhees' view, inappropriate.

Judge Voorhees also deemed it significant that the Attorney General's objection letter had specifically discussed proposals for a second majority-minority district in the southern part of the State, proposals that the State chose not to implement. J.S. App. 49a-55a. According to Judge Voorhees, *UJO* creates a presumption of validity only for those race-conscious redistricting plans that codify in toto the Attorney General's preclearance decision. *Id.* at 51a-52a. That presumption was unavailable here, in Judge Voorhees' view, because the State had acted in "purposeful disregard of the Attorney General's recommendations." *Id.* at 55a.

### SUMMARY OF ARGUMENT

A. The question framed by the Court is not presented to the extent it assumes that the Attorney General suggested a particular redistricting plan to be adopted by the State. Section 5 of the Voting Rights Act does not empower the Attorney General to draw redistricting plans to be adopted by submitting jurisdictions. Rather, when the Attorney General objects to a particular proposed redistricting plan and indicates that a revised plan will not be precleared unless it increases minority voting power, the decision about how to achieve that result is left to the submitting jurisdiction. Thus, in this case, the Attorney General objected to the State's plan on the ground that it failed to create a second majorityminority district, but he did not suggest that the State adopt any particular revised plan in order to cure that violation.

To be sure, the Attorney General's objection letter did refer to the existence of alternative plans that would have created a second majority-minority district in the southern portion of the State, but it did so only in the context of explaining to the State the reasons for the objection. Thus, the Attorney General did not in fact "suggest[]" a particular plan to be adopted by the State, and the State had considerable leeway in revising its redistricting plan to create a second majority-minority district.

B. 1. The State's use of race in drawing its revised redistricting plan was constitutionally permissible under this Court's decision in *United Jewish Organizations of Williamsburgh*, Inc. v. Carey, 430 U.S. 144 (1977) [hereinafter *UJO*]. In that case, a four-Justice plurality concluded that a State could

constitutionally redistrict along racial lines in order to comply with the Attorney General's construction of Section 5, at least where that construction was authorized by the statute. 430 U.S. at 162-165 (opinion of White, J.). Two additional Justices concluded that a State's intent to satisfy the Attorney General's Section 5 objection, standing alone, precluded any finding that the State had acted with invidious discriminatory intent in intentionally creating majority-minority districts. *Id.* at 179-180 (Stewart, J., joined by Powell, J., concurring in the judgment).

UJO is controlling here. The Attorney General objected to the original redistricting plan proposed by the State because he determined that the State had failed to meet its burden of showing that its plan was free of discriminatory purpose. In particular, the Attorney General determined that the State failed to create a second majority-minority district for what appeared to be pretextual reasons. That determination "was authorized by [this Court's] constitutionally permissible construction of § 5." UJO, 430 U.S. at 164. Accordingly, the State's race-conscious creation of District 12 in order to satisfy the Attorney General's Section 5 objection was permissible under the rationale of UJO.

2. To be sure, a State's intent to satisfy the requirements of Section 5 does not insulate the State's use of race from all challenges whatsoever. There is no contention here, however, that the State took race into account in an attempt to minimize the voting strength of any racial group to any greater degree than was necessary in order to avoid a violation of Section 5 by drawing a second majority-minority district. Nor is there any allegation that the State's decision to create the particular majority-minority dis-

trict it did was the result of an invidious racially discriminatory purpose.

The fact that the State's revised redistricting plan moves some white voters, but not others, from majority-white districts into a majority-minority district also does not demonstrate invidious racial discrimination. That result is inevitable if States are to be permitted to comply with Section 5 by creating majority-minority districts, and *UJO* clearly holds that creation of such districts is appropriate in order to comply with Section 5.

- 3. The fact that District 12 is neither compact nor aesthetically pleasing does not undermine the constitutionality of the State's decision to draw that district. The Constitution does not require compact disricts, and the States are free to reject redistricting criteria such as compactness in favor of other policy objectives as they see fit. The State's decision to create District 12 rather than some other majority-minority district was not based on racial considerations, and thus appellants' challenge to the configuration of that district is without merit.
- C. Nothing in this Court's more recent cases undermines the validity of *UJO* in the redistricting context. While the courts may appropriately treat most forms of race-conscious action by state and local government as suspect, the situation is different with respect to redistricting, because in that context state and local authorities must sometimes act in a race-conscious manner in order to comply with the Voting Rights Act. The Act requires state and local governments to draw majority-minority districts in certain circumstances, and thus Congress has in effect commanded redistricting authorities to take race into account to the extent necessary to comply with the Act.

Accordingly, a State's use of race to draw majorityminority districts cannot be treated as suspect.

### ARGUMENT

THE STATE'S INTENTIONAL USE OF RACE FOR THE PURPOSE OF COMPLYING WITH THE VOTING RIGHTS ACT DOES NOT CONSTITUTE INVIDIOUS RACIAL DISCRIMINATION IN VIOLATION OF THE CONSTITUTION

A. The Question Framed By The Court Is Not Presented To The Extent That It Assumes That The Attorney General Suggested A Particular Plan To The State

In reviewing proposed redistricting plans under Section 5, the Attorney General looks to whether the jurisdiction has satisfied its burden of showing that the plan "does not have the purpose and will not have the effect" of diluting minority voting strength. 42 U.S.C. 1973c. If the Attorney General concludes that a jurisdiction has failed to satisfy that burden with respect to a particular plan, the Attorney General objects to that plan and states the reasons for the objection. 28 C.F.R. 51.44(a). The Attorney General is not empowered, however, to draw a new plan to be adopted by the submitting jurisdiction.

To be sure, a finding by the Attorney General that a jurisdiction's proposed plan has the purpose or effect of diluting minority voting strength may, depending on the circumstances, indicate that a revised plan will not be precleared unless it increases minority voting strength to the extent necessary to satisfy the objection. But the decision about how to increase minority voting strength in a revised plan is left entirely to the submitting jurisdiction, in keeping with this Court's repeated pronouncements that state and local jurisdictions have the primary responsibility

for devising new redistricting plans to remedy past violations. See, e.g., Wise v. Lipscomb, 437 U.S. 535, 539-541 (1978) (opinion of White, J.); Connor v. Finch, 431 U.S. 407, 414-415 (1977); Reynolds v. Sims, 377 U.S. 533, 586 (1964).

The Attorney General followed this statutory and regulatory framework in his treatment of North Carolina's congressional redistricting plan. The Attorney General objected to the original plan submitted by the State because the State had failed to show that its plan was free of discriminatory purpose. In particular, the Attorney General determined that the State had failed to draw a second majority-minority district for what appeared to be pretextual reasons. App., infra, 9a-11a; J.S. App. 3a-4a. The Attorney General did not, however, suggest that the State adopt any particular revised plan in lieu of its invalid original submission.

In explaining the reasons for the objection, of course, the Attorney General did note that "[f]or the south-central to southeast area, there were several plans drawn providing for a second majorityminority congressional district, including at least one alternative presented to the legislature," and that "such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons." App., infra, 10a-11a; J.S. App. 4a. Those statements were in keeping with the Justice Department's usual approach in such cases: One of the factors routinely considered by the Attorney General in determining whether a proposed redistricting plan evinces a discriminatory intent is the "extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered." 28 C.F.R. 51.59(e). Reference to such alternatives in an objection letter has a limited purpose: to help the jurisdiction understand why the Attorney General has concluded that the existing plan is not free of discriminatory purpose. 28 C.F.R. 51.44(a). It does not constitute a direction, or even a suggestion, that the jurisdiction must cure an objection in a particular way.

Thus, the Attorney General's mention of alternative plans in his objection letter in this case did not constitute a suggestion that the State adopt one of those plans or draw a second majority-minority district in a particular area or in a particular way. Rather, the decision about how to draw a second majority-minority district was left to the State.

The question to be briefed in this case assumes that the State "did not accede to the plan suggested by the Attorney General but instead developed its own." As the previous discussion demonstrates, however, the Attorney General did not "suggest[]" a particular revised plan to be adopted by the State. The objection letter plainly stated that the State would have to draw a second majority-minority dis-

trict in order to receive preclearance from the Attorney General, but it did not suggest any one means of accomplishing that objective.<sup>5</sup>

Appellants have never argued otherwise. In their complaint, appellants did not allege that the Attorney General suggested one plan and the State decided to craft another. To the contrary, they alleged that the Attorney General coerced the State into drawing the very plan at issue here. J.S. App. 88a. Their brief in this Court similarly does not contend that the Attorney General suggested one way to draw a second majority-minority district, while the State chose another. See Appellants' Br. 76, 78.

Thus, we address below the remaining aspects of the question framed by the Court: whether the State's race-conscious and purposeful creation of two majority-minority districts in its revised redistricting plan was a constitutionally permissible response to the Attorney General's suggestion in his objection

This does not mean, of course, that the State was free to draw a second majority-minority district in any manner it saw fit. All redistricting plans adopted by covered jurisdictions must be precleared under Section 5, including those "designed to remove the elements that caused objection by the Attorney General to a prior submitted [plan]." 28 C.F.R. 51.12. Thus, when the State revised its redistricting plan, it submitted that revised plan to the Attorney General, who was required to determine once again whether the State had satisfied its burden of proving the absence of discriminatory purpose and effect. After determining that the State's revised plan was free of discriminatory purpose and effect, the Attorney General did not interpose an objection to that plan. App., infra, 13a-14a.

<sup>&</sup>lt;sup>5</sup> As noted above (pp. 2-3 & n.1, supra), the State could have requested that the Attorney General reconsider his objection, and could have sought judicial preclearance by filing a declaratory judgment action in the United States District Court for the District of Columbia. The State chose not to exercise either of those options.

<sup>&</sup>lt;sup>6</sup> In his dissent, Judge Voorhees concluded that by drawing a second majority-minority district along Interstate 85 rather than in the southern part of the State, the State had "disregarded" the Attorney General's "prescriptions for reapportionment in North Carolina" "in favor of its own predilections." J.S. App. 52a, 53a. In approaching the case in this fashion, however, Judge Voorhees misunderstood both the Attorney General's objection letter and the nature of appellants' complaint.

letter that creation of a second such district was necessary in order to ensure compliance with Section 5.7

B. The State's Use Of Race In Creating Its Revised Redistricting Plan Was Constitutionally Permissible Under This Court's Voting Rights Precedents

Appellants contend that the State's explicit use of race to draw two majority-minority districts unconstitutionally discriminated against white voters in North Carolina, either because the use of race as a factor in redistricting is unconstitutional per se (Br. 20-51) or because the State's use of race in this case cannot survive strict scrutiny (Br. 52-68). This Court addressed a similar claim in United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) [hereinafter UJO]. While members of the Court differed somewhat in their precise rationales, seven of the eight Justices participating agreed that the use of race in redistricting is not unconstitutional per se, and that a State's intentional

creation of majority-minority districts does not necessarily violate the constitutional rights of white voters. Under *UJO*, North Carolina's deliberate use of race to create two districts in which blacks constitute a majority was constitutional because it was a permissible way for North Carolina to achieve compliance with Section 5.

1. In UJO, the State of New York had "deliberately revis[ed] its reapportionment plan along racial lines" in order to create several districts in which minorities would constitute at least 65 percent of the population. 430 U.S. at 155, 162 (opinion of White. J.). In so doing, the State was motivated by an intent "to comply with the Voting Rights Act as construed by the Attorney General." Id. at 155. A plurality of four Justices rejected the claim that this was an insufficient justification for using race in drawing district lines. Id. at 162-165. The plurality reasoned that Section 5 is constitutional in its "authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color," and that the State "did [no] more than accede to a position taken by the Attorney General that was authorized by \* \* \* § 5." Id. at 161, 164.

Two additional Justices also concluded that a State could permissibly resort to race to achieve compliance with Section 5. 430 U.S. at 179-180 (Stewart, J., joined by Powell, J., concurring in the judgment). Those Justices were of the view that the State's intention to satisfy the Attorney General's objections "foreclose[d] any finding that it acted with the invidious purpose of discriminating against white voters," regardless of whether the Attorney General's position "was required or even authorized by the

.

<sup>&</sup>lt;sup>7</sup> In keeping with the Court's order framing the question to be briefed by the parties, we will not present argument concerning our contentions that the district court (and, therefore, this Court as well) lacked subject matter jurisdiction over appellants' claims against the federal appellees and that, in any event, the Attorney General's exercise of his authority under Section 5 is not subject to judicial review. We continue to maintain those positions, however. See U.S. Mot. to Aff. 6-13.

<sup>&</sup>lt;sup>8</sup> In *UJO*, the United States urged the Court to reject the view that race is never a permissible consideration in redistricting. In particular, we argued that this contention "ignores the unavoidable realities of legislative redistricting and would make compliance with [Section 5] virtually impossible in the context of redistricting." 75-104 U.S. Br. at 39.

Voting Rights Act." 430 U.S. at 130 & n.\*. For those two Justices, it was sufficient "that the Voting Rights Act and the procedures used to implement it are constitutionally valid, and that the procedures followed in this case were consistent with the Act." *Id.* at n.\* (citations omitted).

North Carolina's decision to create two majorityminority districts is constitutional under the rationale of the UJO plurality and, a fortiori, under that of the two concurring Justices. In his objection letter, the Attorney General explained that the State had not shown that its plan was free of discriminatory purpose. In particular, the Attorney General determined that the State's reasons for failing to draw a second majority-minority district appeared to be pretextual. App., infra, 10a-11a. For that reason, he concluded that the original plan could not be precleared. Id. at 11a. As in UJO, that determination was unquestionably "authorized by \* \* \* § 5." UJO, 430 U.S. at 164. Section 5 requires the Attorney General to object to proposed redistricting plans that have a discriminatory "purpose," and the submitting jurisdiction bears the burden of demonstrating the absence of such impermissible purpose. 28 C.F.R. 51.52(a); see City of Pleasant Grove v. United States, 479 U.S. 462, 471 & n.11 (1987); City of Richmond v. United States, 422 U.S. 358, 378-379 (1975). Thus, in this case the State had the burden of demonstrating that its failure to create a second majority-minority district was not motivated by a discriminatory purpose. The Attorney-General determined (App., infra, 11a) that the State failed to meet that burden, a determination that "was authorized by [this Court's] constitutionally permissible construction of § 5." UJO, 430 U.S. at 164. Ac-

Ea.

cordingly, there would be no ground for contesting the Attorney General's right to object to the State's original redistricting plan, even if that issue were properly before the Court. But see *Morris* v. *Gressette*, 432 U.S. 491, 504-507 (1977) (holding that the Attorney General's exercise of administrative discretion under Section 5 is not subject to judicial review in any court).

As appellants have conceded, in deciding to draw a plan with a second majority-minority district, North Carolina simply acquiesced in the Attorney General's finding of a Section 5 violation. Accordingly, the State's decision to create a second majority-minority district was permissible under *UJO*.

2. To be sure, the fact that the State drew revised District 12 in an effort to avoid a violation of Section 5 does not preclude a challenge to the manner in which the State drew that District. For example, the State's intention to avoid a violation of Section 5 would not shield the State from liability if it chose to adopt a particular plan not merely because that plan created a second majority-minority district but also because it, unlike other plans containing two majorityminority districts, served to minimize the voting power of another racial group. Appellants do not allege, however, that the State's plan diminished white voting strength to a greater extent than would have been the case with any plan designed to avoid a violation of Section 5 by drawing a second majorityminority district, nor do they allege that the State intended to achieve any such result. Absent such an allegation, this case falls squarely within the rationale of UJO, because the State's use of race was intended

to avoid a violation of Section 5. UJO, 430 U.S. at 164-165.

In his dissenting opinion below, Judge Voorhees emphasized that the State could have drawn a second district in the southern part of the State, rather than along Interstate 85. Had the State chosen that course, however, the overall impact on white voters would have been precisely the same: white voters would have been the majority in ten congressional districts, and the minority in two. Nothing about the State's selection of the particular configurations it chose for the two majority-minority districts demonstrates an invidious racially discriminatory purpose, and appellants make no allegation to the contrary.

As the dissent noted, District 12 affects different white voters than those who would have been affected had the majority-minority district been created in the southern portion of the State instead. But there is no allegation that the choice of which white voters would be affected by the second majority-minority district was made for race-related reasons.9 In order to devise a revised plan that satisfied the requirements of Section 5, the State necessarily had to move some white voters who had previously been in a majoritywhite district into a majority-black district. That inevitable consequence of curing an objection cannot be invidious under UJO. If white voters who were assigned to a majority-minority district in order to cure a Section 5 violation could successfully challenge a State's redistricting plan on the ground that some other group of white voters could have been so assigned instead, the State would be precluded from ever curing such violations. *UJO* clearly holds that the States may create additional majority-minority districts in order to avoid violations of Section 5, and thus claims of this type must be rejected.

3. Appellants assert (Br. 63-65) that the State's plan violates all accepted neutral redistricting criteria, and that *UJO* therefore does not authorize the State's use of race in redistricting. Appellants' claim that the State ignored all relevant redistricting considerations is, however, overstated. For example, the districts in the State's revised plan do not vary impermissibly in population, nor is any district composed of discrete segments located in entirely different parts of the State.

It is true that District 12 is neither compact nor aesthetically pleasing. And it may be that a southern majority-minority district would have been less subject to criticism on those grounds. J.S. App. 5a n.3 (noting the support for this alternative by various groups); id. at 3a-4a (noting that the shape of such a district would have been no more irregular than that of the other districts in the State's plan). But those qualities are not constitutional imperatives. The State was free to decide that other interests, such as the desire to protect incumbents or to create a predominantly urban district, favored the selection of District 12 over a southern district. See note 2, supra. Balancing those kinds of competing policy considerations is a legislative, not a judicial, function. See Pope v. Blue, No. 3:92CV71-P (W.D.N.C. Apr. 16, 1992), reproduced in 91-2038 J.S. App. at 3a-16a (rejecting contention that the plan at issue here is

<sup>&</sup>lt;sup>9</sup> Indeed, it is doubtful that any such allegation could be made: A State's decision to burden one group of white voters rather than another would generally not support an inference of racially discriminatory purpose.

unconstitutional because it arbitrarily disregarded standards of contiguity and compactness, id. at 12a), aff'd mem., 113 S. Ct. 30 (1992). North Carolina did not lose its power to strike a balance among competing policy considerations merely because it was also seeking to comply with Section 5.

Whatever concerns there may be about the State's choice of District 12 over a southern district, they are not racial ones. Both District 12 and the various proposed southern majority-minority districts were intended to have the same racial effect: creation of a second congressional district in which blacks constituted a majority of the VAP, with a concomitant reduction in the number of white-controlled districts. That effect is precisely the result contemplated by the Attorney General's objection: one more majority-black district and one fewer majority-white district. The State's consideration of race in drafting its revised plan therefore did not violate the Constitution, because race was considered for the unquestionably legitimate purpose of complying with Section 5.10

C. This Court's Recent Decisions Concerning The Validity Of Race-Conscious Government Action Do Not Undermine The Propriety Of Race-Conscious Redistricting Undertaken In Order To Avoid Violations Of The Voting Rights Act

Appellants contend (Br. 65) that *UJO* has been undercut by this Court's subsequent decisions. In particular, appellants rely on *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), which held that racial classifications by state and local governments generally must be subjected to strict scrutiny, regardless of "the race of those burdened or benefited." *Id.* at 494 (opinion of O'Connor, J.). In our view, nothing in *Croson* or the other cases relied on by appellants undermines the continued vitality of *UJO* in the redistricting context.

Appellants' attempt to analogize race-conscious redistricting to other types of race-conscious government action is fatally flawed, because it ignores a crucial factor that is unique to the redistricting context. In other contexts, the courts may appropriately treat race-conscious action by state and local government as suspect, because race usually has no legitimate role to play in activities such as hiring, contracting, and jury selection. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); City of Richmond v. J.A. Croson Co., supra; Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 111 S. Ct. 1364 (1991); Georgia v. McCollum, 112 S. Ct. 2348 (1992). When they engage in activities of that nature, state and local jurisdictions can comply with the dictates of federal law simply by using race-neutral practices,

<sup>10</sup> In UJO, three Justices concluded that, quite apart from the obligations imposed by the Voting Rights Act, a jurisdiction could take race into account in redistricting as long as the redistricting plan as a whole did not "minimize or unfairly cancel out" the voting strength of any racial group. UJO, 430 U.S. at 165 (opinion of White, J.); see also id. at 167 (redistricting plan based on racial factors permissible if it sought "to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters"). There is no need in this case to decide whether that rationale would provide an additional ground for affirming the district court's judgment. We note, however, that UJO necessarily stands for the proposition that a State's use of race to comply with the Voting Rights Act is

not rendered unconstitutional simply because the State may also be seeking to achieve a fair allocation of political power.

and thus there is generally no need or justification for them to act in a race-conscious manner.

The situation is much different with respect to redistricting. Even where redistricting authorities have not engaged in purposeful racial discrimination, they must sometimes act in a race-conscious manner in order to fulfill their obligations under the Voting Rights Act. See UJO, 430 U.S. at 159, 161 (opinion of White, J.). Section 5, for example, requires covered jurisdictions intentionally to draw majorityminority districts where necessary to avoid retrogression in minority voting strength or when the failure to draw a majority-minority district would reflect purposeful discrimination. Id. at 159-161; see generally Beer v. United States, 425 U.S. 130, 140-142 (1976); City of Richmond v. United States, 422 U.S. 358, 378-379 (1975). Section 2 of the Voting Rights Act requires all state and local jurisdictions to draw majority-minority districts if the failure to do so would lead to discriminatory "results." 42 U.S.C. 1973(a); Thornburg v. Gingles, 478 U.S. 30 (1986). Accordingly, if state and local governments are to make good faith efforts to comply with their obligations under federal law, it will frequently be the case that they must engage in race-conscious redistricting.

Any other result would fly directly in the face of Congress's enactment of the Voting Rights Act itself. In effect, Congress has commanded the States and their political subdivisions to redistrict in a race-conscious manner to the extent necessary to avoid violations of the Act. Cf. Croson, 488 U.S. at 491 (opinion of O'Connor, J.) ("'Congress may authorize, pursuant to section 5 [of the Fourteenth Amendment], state action that would be foreclosed to the states acting alone.'") (quoting Bohrer, Bakke,

Weber, and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L.J. 473, 512-513 (1981)). To view the purposeful drawing of majority-minority districts as suspect would ignore the legal landscape in which redistricting authorities must operate, and would undermine Congress's decision to require such conduct where necessary to avoid discriminatory results. Accordingly, the conclusion is inescapable that UJO, not Croson, states the proper approach in judging the validity of race-conscious redistricting actions taken in order to avoid violations of the Voting Rights Act.

<sup>11</sup> Moreover, as this Court has recognized, redistricting is not a "neutral" phenomenon. It "inevitably has and is intended to have substantial political consequences." Gaffney v. Cummings, 412 U.S. 735, 752-753 (1973). For this reason, groups with distinctive political interests seek to influence the way in which district boundaries are drawn. Those participating in this process include not only political parties, groups with the same occupation, and groups with the same socioeconomic status, but also racial, ethnic, and religious groups. Whitcomb v. Chavis, 403 U.S. 124, 156 (1971); Davis v. Bandemer, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment). In redistricting, a State seeks to "reconcile the competing claims of [these] groups." Davis. 478 U.S. at 147 (O'Connor, J., concurring in the judgment). One of the principal goals of the Voting Rights Act is to ensure that States do not perform that task in a manner that discriminates against racial minorities.

### CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

THOMAS G. HUNGAR
Assistant to the Solicitor General

JESSICA DUNSAY SILVER IRVING GORNSTEIN Attorneys

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### APPENDIX A

### STATUTORY PROVISIONS INVOLVED

42 U.S.C.:

- § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
- (b) A violation of subsection (a) of this section is established if based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect

of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixtyday period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

### APPENDIX B

SEAL

### U.S. DEPARTMENT OF JUSTICE

Civil Rights Division

Dec. 18, 1991

Office of the Assistant Attorney General Washington, D.C. 20035

Tiare B. Smiley, Esq. Special Deputy Attorney General P.O. Box 629 Raleigh, North Carolina 27602-0629

Dear Ms. Smiley:

This refers to Chapter 675 (1991), which provides for the 1991 redistricting and a change in the method of election from 42 single-member districts and 30 multimember districts to 75 single-member districts and 20 multimember districts for the House of Representatives; Chapter 676 (1991), which provides for the 1991 redistricting plan and a change in the method of election from 22 single-member districts and 28 multimember districts to 34 single-member districts and 8 multimember districts for the Senate: and Chapter 601 and Chapter 761 (1991), which provide for the increase from eleven to twelve congressional districts and the 1991 redistricting plan for the congressional districts for the State of North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our request for more information on November 5, 1991; supplemental information was received on November 18, 20, 21, 25, 26 and 27, and December 4, 10, 12 and 13, 1991.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. At the outset, we note that 40 of North Carolina's 100 counties are covered under the special provisions of Section 5 of the Voting Rights Act. As it applies to the redistricting process, the Voting Rights Act requires the Attorney General to determine whether the submitting authority has sustained its burden of showing that each of the legislative choices made under a proposed plan is free of racially discriminatory purpose or retrogressive effect and that the submitted plan will not result in a clear violation of Section 2 of the Act. In the case of statewide redistrictings such as the instant ones, this examination requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in arriving at a particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52(a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities, see, e.g., Garza v. Los Angeles County, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1408-09 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985), or where the proposed plan, given the demographics and racial concentrations in the jurisdiction, does not fairly reflect minority voting strength. Thornburg v. Gingles, 478

U.S. 30 (1986); Hastert v. State Board of Elections, — F. Supp. — (N.D. Ill., Nov. 6, 1991), 1991 WL 228185; Wilkes County, Georgia v. United States, 450 F. Supp. 1171, 1176 (D.D.C. 1978), aff'd. mem., 439 U.S. 999 (1978).

Such concerns are frequently related to the unnecessary fragmentation of minority communities or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular jurisdiction's need to redistrict and the options available to the legislature. Finally, our entire review is guided by the principle that the Act ensures fair election opportunities and does not require that any jurisdiction guarantee minority voters racial or ethnic proportional results.

With this background in mind, our analysis shows that, in large part, in North Carolina House, Senate and Congressional redistricting plans meet the Section 5 preclearance requirements. Each plan, however, has particular problems which raise various concerns for us under the Voting Rights Act. We describe each of these problem areas separately below.

Respecting the House plan, the proposed configuration of district boundary lines in the following three areas of the state appear to minimize black voting strength: the Southeast area, involving Sampson, Pender, Bladen, Duplin, New Hanover, Wayne, Lenoir and Jones Counties; the Northeast area in which the state proposes to create District 8; and Guilford County.

In general, it appears that in each of these areas the state does not propose to give effect to overall black voting strength, even though it seems that boundary lines logically could be drawn to recognize black population concentrations in each area in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect candidates of their choice. Another factor which appears to adversely impact on minority voting strength, by limiting the number of majority minority districts, was the state's decision to manipulate black concentrations in a way calculated to protect white incumbents.

In the Southeast area of the state, the state was aware of the significant interest on the part of the black community in creating districts in which they would constitute a majority. In fact, alternatives providing for two additional black majority districts were presented to the legislature. Rather than using this approach to recognize black voting strength, however, the proposed plan submerges concentrations of black voters in several multimember, white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

In the Northeastern portion of the state, District 8 seems to have been drawn in such a way as to limit unnecessarily the potential for black voters to elect representatives of their choice. In spite of the 58 percent black population majority, serious concerns have been raised as to whether black voters in this district will have an equal opportunity to elect their preferred candidate, particularly given the fact that only 52 percent of the registered voters in the

district are black. Our analysis indicates that a number of different options are available to draw District 8 in a manner which provides blacks an equal opportunity to participate in the electoral process (e.g., including in District 8 black concentrations in adjoining districts).

Similarly, in Guilford County, the proposed plan fails to recognize black population concentrations, although reasonable configurations of boundary lines would permit an additional district that would provide black voters the opportunity to elect their candidates of choice. While we have noted the state's assertion that the division of the black community in Guilford County into several districts enhances black voting strength by providing black voters an opportunity to influence elections in additional districts, it appears that the plan in fact was designed to ensure the re-election of white incumbents. This conclusion is bolstered by what appears to be similarly motivated decisions of the legislature involving other areas of the state, such as in Mecklenburg County. There, the state drew two minority House districts, while the minority population appears to be sufficiently concentrated to allow for the drawing of three districts in which black voters would have an opportunity to elect candidates of their choice. While we are aware that Mecklenburg is not a county subject to the preclearance requirements of Section 5, information regarding the choices of boundary line changes in the county is relevant to our review of the concern that purposeful choices were made throughout the redistricting processes that adversely impact minority voting strength.

Respecting the Senate redistricting plan, the state has proposed district boundary lines in the southeast

region of the state that appear to minimize black voting strength, given the particular demography of this area. Although boundary lines logically could be drawn to recognize black population concentrations in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect a candidate of their choice, the proposed districts seem to be the result of the state's decision to use concentrations of black voters in white majority districts to protect white incumbents. Black citizens from this area testified that they felt a black majority single-member district could be fairly drawn, and alternatives providing for a black majority district were presented to the legislature. It appears, however, that concentrations of black voters have been submerged in several white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

Respecting the congressional redistricting plan, we note that North Carolina has gained one additional congressional seat because of an increase in the state's population. The proposed congressional plan contains one majority black congressional district drawn in the northeast region of the state. The unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and, indeed, at least one alternative configuration was available that would have been more compact. Nonetheless, we have concluded that the irregular configuration of that district did not have the purpose or

effect of minimizing minority voting strength in that region.

As in the House and Senate plans, however, the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state. Jeffers v. Clinton, 730 F.Supp. 196, 207 (E.D. Ark. 1989), affirmed, 111 S. Ct. 662 (1991).

We also note that the state was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina. For the southcentral to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature. No alternative plan providing for a second majority-minority congressional district was presented by the state to the public for comment. Nonetheless, significant support for such an alternative has been expressed by the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU). These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second

majority-minority congressional district was dismissed for what appears to be pretextual reasons. Indeed, some commenters have alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength. Such submergence will have the expected result of "minimiz[ing] or cancel[ling] out the voting strength of [black and Native American minority voters]." Fortson v. Dorsey, 379 U.S. 433, 439 (1965). Although invited to do so, the state has yet to provide convincing evidence to the contrary.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance with respect to the three proposed plans under review. Therefore, on behalf of the Attorney General, I must object to the 1991 redistricting for the North Carolina State House, Senate and Congressional plans to the extent that each incorporates the proposed configurations for the areas discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1991 House, Senate and Congressional redistricting plans have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the 1991 redistrictings for the North Caro-

lina House, Senate and Congressional plans continue to be legally unenforceable. *Clark* v. *Roemer*, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of North Carolina plans to take concerning these matters. If you have any questions, you should call Richard Jerome (202-514-8696), an attorney in the Voting Section.

Sincerely,

/s/ John R. Dunne John R. Dunne Assistant Attorney General Civil Rights Division

### APPENDIX C

[SEAL]

# U.S. DEPARTMENT OF JUSTICE Civil Rights Division

Office of the Assistant Attorney General Washington, D.C. 20035

February 6, 1992

Tiare B. Smiley, Esq. Special Deputy Attorney General P.O. Box 629 Raleigh, North Carolina 27602-0629

Dear Ms. Smiley:

This refers to Chapter 7, (1991 Extra Session), which provides for the redistricting of congressional districts and an increase from eleven to twelve congressional districts: Chapter 5 (1991 Extra Session). which provides for the redistricting and a change in the method of election from 42 single-member districts and 30 multimember districts to 81 single-member districts and 17 multimember districts for the North Carolina House of Representatives; and Chapter 4 (1991 Extra Session), which provides for the redistricting and a change in the method of election from 22 single-member districts and 28 multimember districts to 34 single-member districts and 8 multimember districts for the Senate for the State of North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received the House and Senate submissions on January 17, 1992; supplemental information was received on January 23, 24, 27, 28, and 30, 1992. We received the congressional submission on January 28; supplemental information was received on January 31.

The Attorney General does not interpose any objection to the specified changes contained in the three plans. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedure for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

/s/ John R. Dunne John R. Dunne Assistant Attorney General Civil Rights Division

#### APPENDIX D

#### NORTH CAROLINA

District Summary
Total Populations, All Ages
Plan: 1992 Congressional Base Plan #10

Plan type: Congressional Base Plan

District Name	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/ PI	Total Other
District 1	552,386	229,829	316,290	3,424	1,146	1,698
	100.00%	41.61%	57.26%	0.62%	0.21%	0.31%
District 2	552,386	421,083	121,212	3,154	4,077	2,860
	100.00%	76.23%	21.94%	0.57%	0.74%	0.52%
District 3	552,387	423,398	118,640	2,436	4,044	3,869
	100.00%	76.65%	21.48%	0.44%	0.73%	0.70%
District 4	552,387	426,361	111,168	1,548	10,602	2,714
	100.00%	77.19%	20.13%	0.28%	1.92%	0.49%
District 5	552,386	463,183	83,824	1,083	2,448	1,848
	100.00%	83.85%	15.17%	0.20%	0.44%	0.33%
District 6	552,386	504,465	41,329	1,973	3,489	1,129
	100.00%	91.32%	7.48%	0.36%	0.63%	0.20%
District 7	552,386	394,855	103,428	40,166	5,835	8,102
	100.00%	71.48%	18.72%	7.27%	1.06%	1.47%
District 8	552,387	402,406	128,417	13,789	4,232	3,543
	100.00%	72.85%	23.25%	2.50%	0.77%	0.64%
District 9	552,387	492,424	49,308	1,729	7,373	1,553
	100.00%	89.14%	8.93%	0.31%	1.33%	0.28%
District 10	552,386	517,542	30,155	942	2,238	1,510
	100.00%	93.69%	5.46%	0.17%	0.41%	0.27%
District 11	552,387	502,058	39,767	7,835	1,791	936
	100.00%	90.89%	7.20%	1.42%	0.32%	0.17%
District 12	552,386	230,888	312,791	2,077	4,891	1,739
	100.00%	41.80%	56.63%	0.38%	0.89%	0.31%
Total	6,628,637	5,008,492	1,456,329	80,156	52,166	31,501
	100.00%	75.56%	21.97%	1.21%	0.79%	0.48%

## NORTH CAROLINA

District Summary
Voting Age Populations
Plan: 1992 Congressional Base Plan #10

Plan type: Congressional Base Plan

District Name	Total Vot. Age	Vot. Age White	Vot. Age Black	Vot. Age Am. Ind.	Vot. Age Asian/ PI	Vot. Age Other
District 1	399,969 100.00%	181,933 45.49%	213,602 53.40%	2,428 0.61%	844 0.21%	1,110
District 2	420,087	328,676	84,311	2,173	3,074	1,963
	100.00%	78.24%	20.07%	0.52%	0.73%	0.47%
District 3	413, <b>263</b>	324,808	81,170	1,755	2,922	2,608
	100.00%	78.60%	19.64%	0.42%	0.71%	0.63%
District 4	428,984	336,850	81,210	1,239	7,782	1,903
	100.00%	78.52%	18.93%	0.29%	1.81%	0.44%
District 5	428,782 100.00%	364,886 85.10%	60,204 14.04%	822 0.19%	$\frac{1,650}{0.38\%}$	1,221 0.28%
District 6	428,096	393,271	30,188	1,433	2,407	798
	100.00%	91.87%	7.05%	0.33%	0.56% -	0.19%
District 7	414,413	306,754	71,071	26,489	4,201	5,898
	100.00%	74.02%	17.15%	6.39%	1.01%	1.42%
District 8	403,678	305,366	84,386	8,699	2,956	2,271
	100.00%	75.65%	20.90%	2.15%	0.73%	0.56%
District 9	421,615	380,364	33,849	1,275	5,059	1,069
	100.00%	90.22%	8.03%	0.30%	1.20%	0.25%
District 10	421,456	397,476	20,837	700	1,409	1,036
	100.00%	94.31%	4.94%	0.17%	0.33%	0.25%
District 11	430,457	396,064	27,438	5,126	1,237	592
	100.00%	92.01%	6.37%	1.19%	0.29%	0.14%
District 12	411,687	186,115	219,610	1,529	3,283	1,150
	100.00%	45.21%	53.34%	0.37%	0.80%	0.28%
Total	5,022,487	3,902,563	1,007,876	53,668	36,824	21,619
	100.00%	77.70%	20.07%	1.07%	0.73%	0.43%

No. 92-357

FEB 44 1993

Supreme Court of the United States

October Term, 1992

Ruth O. Shaw, et al.,

Appellants,

٧.

William Barr, et al., Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

STATE APPELLEES' BRIEF

MICHAEL F. EASLEY North Carolina Attorney General

Edwin M. Speas, Jr., Senior Deputy Attorney General
H. Jefferson Powell\*, Special Counsel to Attorney General
Norma S. Harrell, Special Deputy Attorney General
Tiare B. Smiley, Special Deputy Attorney General

North Carolina Department of Justice Post Office Box 629 Raleigh, North Carolina 27602-0629 (919)733-3786

\*Counsel of Record

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### QUESTION PRESENTED

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

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#### PARTIES

Plaintiffs/appellants are Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett and Dorothy G. Bullock.

Defendants/appellees are Stuart M. Gerson', Acting Attorney General; John Dunne, Assistant Attorney General of the United States, in charge of the Civil Rights Division; James B. Hunt, Jr.', Governor of the State of North Carolina; Dennis A. Wicker', Lieutenant Governor of the State of North Carolina; Daniel T. Blue, Jr., Speaker of the North Carolina House of Representatives; Rufus L. Edmisten, Secretary of State of the State of North Carolina; The North Carolina State Board of Elections; William Marsh, Jr.', Chairman of the North Carolina State Board of Elections; M.H. Hood Ellis, Gregg O. Allen, Ruth Turner O'Bryan, and June K. Youngblood, in their official capacities as members of the North Carolina Board of Elections.

By operation of law these officials have been automatically substituted as parties upon assuming office.

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No. 92-357

# Supreme Court of the United States

October Term, 1992

Ruth O. Shaw, et al.,
Appellants,

V.

William Barr, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

STATE APPELLEES' BRIEF

### CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and regulations:

Sections 1 and 5 of the Fourteenth Amendment to the Constitution of the United States. See Appendix at 1a.

Sections 1 and 2 of the Fifteenth Amendment to the Constitution of the United States. See Appendix at 1a.

Title 42, Section 1973 of the United States Code. See Appendix at 3a.

Title 42, Section 1973c of the United States Code. See Appendix at 5a.

Title 28, Part 51 of the Code of Federal Regulations (pertinent sections). See Appendix at 7a-8a.

#### STATEMENT OF THE CASE

This case presents a constitutional challenge to the congressional redistricting plan ("the Plan") enacted by the North Carolina General Assembly for elections beginning in 1992. As a result of population changes reflected in the 1990 census, the General Assembly faced the task of drawing a new plan with an additional, twelfth congressional seat. Two legal imperatives guided the legislature in performing this task: (1) compliance with the mathematically precise one-person, one-vote principles established by the court in *Reynolds v. Sims*, 377 U.S. 533 (1964), and (2) compliance with §§ 2 and 5 of the Voting Rights Act. 42 U.S.C. § 1973 et seq. Also to be accounted for were communities of interest created by the sometimes unique effects of North Carolina's geography, 1 economy, 2 and demography. 3

According to the 1990 census data, 21.97 percent of North Carolina's citizens are African-American, and 75.56 percent are white. The largest concentrations of African-American citizens live in the Coastal Plain, especially the northern part, and in the Piedmont. Within the Piedmont, the largest concentration of African-American citizens lives in the historically recognized Piedmont Crescent. O. Gade & H. Stillwell, North Carolina: People and Environments 65-66 (1986). "This almost continuous strip of industrial activity" is an arc encompassing North Carolina's largest cities, extending from Raleigh in the east through Durham, Greensboro, High Point and Winston-Salem to Charlotte in the west. W. Powell, North Carolina Through Four Centuries 5 (1989). For much of its length, the Piedmont Crescent is traversed by Interstate 85.

On July 9, 1991, the North Carolina General Assembly ratified a congressional redistricting plan which complied with one-person, one-vote requirements and included a district in the Coastal Plain with an African-American majority. Complaint (hereafter "Comp."), ¶¶ 13, 16, Jurisdictional Statement Appendix (hereafter "J.S. App.") at 78a, 79a. Because forty of North Carolina's one hundred counties are subject to the preclearance requirements of the Voting Rights Act, see 28 C.F.R. Part 51 Appendix, the Plan was submitted to the Attorney General of the United States (hereafter the "Attorney General") for preclearance. Comp. ¶¶ 14-15, J.S. App. at 78a-79a.

Geographically, "North Carolina is divided into 3 rather clearly defined geographic areas: the Coastal Plain, the Piedmont Plateau and the Mountains." H. Lefler & A. Newsom, North Carolina: The History of a Southern State 18 (3rd ed. 1973). Each of these areas "has a distinct history and only in recent years have social and economic factors created a unifying force sufficient to overcome the differences and divisions long attributed to geographic influences." W. Powell, North Carolina Through Four Centuries 1 (1989).

<sup>&</sup>lt;sup>2</sup> The economy of the Coastal Plain is predominantly based on agriculture while the economy of the Piedmont is predominantly based on manufacturing.
O. Gade & H. Stillwell, North Carolina: People and Environment at 244, 250 (1986).

Forty-eight percent of North Carolina's population lives in urban areas and fifty-two percent in rural areas. Of the State's urban residents only 14.5 percent live in cities with populations of more than 100,000. A larger percentage, 18.5 (continued...)

<sup>(...</sup>continued)

percent, live in small towns with populations between 2,500 and 25,000. Some observers have stated that it is "extraordinary that the nation's tenth most populous state is still more rural than urban, particularly when the country as a whole is about 70 percent urban." O. Gade & H. Stillwell, North Carolina at 54.

By letter dated December 18, 1991, the Attorney General objected to the Plan. Comp. ¶ 16, J.S. App. at 79a.4 The basis of the objection was the Attorney General's conclusion that the State had not carried its burden of showing a lack of discriminatory intent. This conclusion was based in part on the Attorney General's view that there was significant interest among minority citizens in having a second majority-minority district and that alternative plans with two majority-minority districts, "including at least one alternative presented to the legislature," did exist, but that these alternatives were "dismissed [by the North Carolina General Assembly] for what appears to be pretextual reasons."

J.S. App. at 4a.5

The "alternative presented to the legislature" with two majority-minority districts contained one such district in eastern and northeastern North Carolina and another majority-minority district in what the Attorney General described as the "south-central to southeast area." The district in the "south-central to southeast area" stretched from the most urban area of North Carolina, the city of Charlotte in Mecklenburg County in the far western portion of the Piedmont, through extremely rural areas, to the coastal town of Wilmington in New Hanover County. What the Attorney General described as "pretextual reasons" included

the State's objection to the fact that the district was described as 191 miles long, mixed urban with rural areas, combined portions of the Piedmont with coastal areas, and combined African-American with Native American populations to achieve a majority-minority district even though there was substantial evidence that African-American and Native American voters did not vote cohesively.

On January 24, 1992, the General Assembly adopted the Plan challenged by Plaintiffs. The Plan satisfies one-person, one-vote requirements by dividing North Carolina's population as evenly as mathematically possible. See Pope v. Blue, No. 3:92CV71-P (W.D.N.C. April 16, 1992), aff'd mem., 113 S. Ct. 30 (1992). It contains two majority-minority districts, both with African-American voting majorities. In the First District, located entirely in the Coastal Plain, more than 80 percent of the residents live in rural areas or towns of less than 20,000 people. In the Twelfth District, drawn along Interstate 85 and the Piedmont Crescent, 80 percent of the residents live in cities with populations of more than 20,000.

<sup>&</sup>lt;sup>4</sup> The letter was not attached to Appellants' (hereafter "Plaintiffs") complaint or otherwise part of the record of the case, but it was quoted extensively by the District Court. See J.S. App. at 3a-4a, 43a, 48a. Copies can be found in the Appendix to this Brief at pages 11a-18a (hereafter "App. pp. \_\_\_\_") and in the Jurisdictional Statement to Pope v. Blue, No. 91-2038, which was filed with the Court by Plaintiffs.

Another alternative plan before the Attorney General included one majority-minority district in the Coastal Plair, and another generally following Interstate 85 through the industrialized Piedmont Crescent. This district closely resembles the Twelfth District ultimately created by the General Assembly and approved by the Attorney General.

The First District is 52.41% African-American in registered voters and 53.40% African-American in voting age population. The Twelfth District is 54.71% African-American in registered voters and 53.34% African-American in voting age population. See the analysis of each district set forth at App. pp. 19a-24a. This analysis reflects data contained in the 1990 Census of Population and Housing, P.L. 94-171, and was submitted to the Attorney General as a part of the request to preclear the Plan. The African-American percentages in the First and Twelfth Districts were achieved by drawing the two districts so they included parts of seventeen of the nineteen North Carolina counties with 20,000 or more African-American residents.

Most of the counties included in whole or in part in the First District are subject to the preclearance requirements of § 5 of the Voting Rights Act. Additionally, eleven counties that are included in whole or in part in the First District were involved in two of the state legislative districts held in Thornburg (continued...)

After the Plan was submitted to the Attorney General and precleared, Comp. ¶ 18, J.S. App. at 81a, Plaintiffs filed this action claiming that the Plan was a racial gerrymander in violation of Article One §§ 2 and 4 and of the Fourteenth and Fifteenth Amendments to the Constitution. The Plaintiffs, who are five white residents of the new Second and Twelfth congressional districts, sued the United States Attorney General and the Assistant Attorney General in charge of the Civil Rights Division in their official capacities. Comp. ¶ 6, J.S. App. at 73a-74a. They also sued the North Carolina State Board of Elections and a number of state officials in their official capacities. The complaint alleged that the federal Defendants "coerced" the state Defendants "into creating two amorphous" majority-minority districts and abridged the rights of all citizens and voters of North Carolina by their "enforcement of an erroneous interpretation of the Voting Rights Act. . . . " Comp. ¶ 28, 29, J.S. App. at 88a-90a. Although Plaintiffs amended their complaint to allege specifically that the state Defendants had an "unconstitutional and racially discriminatory intent and purpose" in drawing the districts, they did so by attributing an unconstitutional intent and purpose to the state Defendants in "conform[ing] to the requirements prescribed by" the federal Defendants. Amendment to Comp. ¶ 36(A), J.S. App. at 101a-04a (hereafter "Comp. ¶ 36(A).").

The three-judge District Court dismissed the claims against the state Defendants for failure to state a claim for relief pursuant

7(...continued)

to Fed. R. Civ. P. 12(b)(6). It concluded that Plaintiffs' "broad claim of per se unconstitutionality because of the form of race-consciousness in redistricting at issue here is flatly foreclosed by .... United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977). ... " J.S. App. at 18a-19a. The majority also concluded that Plaintiffs had not alleged the necessary invidious discriminatory intent nor discriminatory impact on the part of the state Defendants in drawing the plan. J.S. App. at 21a-24a. Judge Voorhees dissented from this part of the opinion below. J.S. App. at 27a, 60a, 29a-60a generally."

#### SUMMARY OF ARGUMENT

Assembly created two majority-minority congressional districts in order to comply with the requirements of the Voting Rights Act (as interpreted by the United States Attorney General) and that this purpose was constitutionally invidious. This argument is squarely contrary to this Court's equal protection decisions, including the cases addressing race-based claims of vote dilution and gerrymandering. See, e.g., Rogers v. Lodge, 458 U.S. 613 (1982). Those decisions hold that a legislature's intent is invidious only when its decision was motivated in part "because of, not merely in spite of, [the decision's] adverse effects" on the allegedly injured group. McCleskey v. Kemp, 481 U.S. 279, 298 (1987). In the present case, the Plaintiffs have not alleged, and the District Court correctly held that they could not plausibly allege, that the

v. Gingles, 478 U.S. 30 (1986), to violate § 2 of the Act. The Twelfth District includes portions of two counties subject to the preclearance requirements of § 5 of the Voting Rights Act — specifically, Gaston and Guilford Counties — and portions of Mecklenburg and Forsyth Counties, in which violations of § 2 of the Voting Rights Act were found with respect to legislative districts in Gingles. In addition, the Twelfth District includes part of Durham County, in which significant racially polarized voting was found in Gingles.

The majority also dismissed the claims against the federal Defendants for lack of jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. Rule 12(b)(1) and (6). J.S. App. at 7a-12a. Judge Voorhees joined the part of the opinion dismissing the claim against the federal defendants for lack of jurisdiction, but dissented from the Rule 12(b)(6) ruling regarding the federal defendants on the grounds that the court should not have considered the question. J.S. App. at 27a-29a, 60a.

legislature's decision embodied an intent to impose an adverse effect upon any racial group. The Plaintiffs, instead, ask the Court to abandon its traditional understanding of invidious intent for a revisionist interpretation that is not supported by the original meaning or the purpose of the Fourteenth or Fifteenth Amendments and that would require the Court to repudiate settled case law.

The decisions adjudicating race-based claims of unconstitutional vote dilution also require that plaintiffs allege a discriminatory effect amounting to exclusion from the political process. See, e.g., White v. Regester, 412 U.S. 755 (1973). The Plaintiffs make no allegation of such a discriminatory effect, and the District Court correctly held that they could not plausibly do so. The complaint, therefore, fails to state a cause of action both because it does not allege invidious intent and because it does not allege discriminatory effect.

In the alternative, the Plaintiffs argue that the State's Plan should be evaluated under the strict scrutiny inquiry applied to remedial racial preferences in public education, employment and contracting. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). There is, however, no reason for the Court to abandon its well-established case law governing claims about districting, e.g., Rogers v. Lodge, supra. The Plan does not afford or deny the relevant public good (the right to vote and to participate in the political process) on the basis of race, which is the situation the Croson test is designed to address. If Croson did apply, furthermore, it is evident from the Plaintiffs' own allegations that the Plan is a narrowly tailored means of pursuing the State's compelling interest in complying with the Voting Rights Act and addressing the present effects of public and private racial discrimination.

#### **ARGUMENT**

#### INTRODUCTION

The Court has directed the parties to brief the following question:

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

In the context of this case, the answer to the Court's question is, "Yes." Assuming arguendo that "the legislature did not accede to the plan suggested by the Attorney General," nevertheless, the Plaintiffs' allegations, and the premises on which their case is founded, do indeed preclude any "finding" that the legislature's congressional redistricting Plan was adopted with invidious discriminatory intent.

Plaintiffs have alleged that the state Defendants drew their plan to comply with the Voting Rights Act, or at least to conform to the Attorney General's requirements for preclearance under § 5

<sup>&</sup>lt;sup>9</sup> The Attorney General has no statutory authority to suggest a redistricting plan, and the state Defendants do not understand the Attorney General's objection letter to have taken the unprecedented step of proposing a plan. To the extent that the letter implicitly suggested the means by which the State might satisfy the Attorney General's concerns, the suggestion was that the legislature create a second majority-minority district. The State's Plan, of course, did so. To the extent that the letter implicitly suggested where the districts should be located, alternative suggestions were made. One of those alternatives was in fact incorporated in the State's Plan.

of the Voting Rights Act. Plaintiffs have not alleged that the state Defendants used the preclearance process as a pretext for achieving some other racially-based motive in addition to the conscious drawing of majority-minority districts. That being so, Plaintiffs' complaint is grounded on a foundation which turns not upon whether the state Defendants acceded to any specific "plan suggested by the Attorney General," but on the assumption that the state Defendants' purpose was to satisfy the Attorney General's objection, regardless of where or how the districts were drawn. Plaintiffs' complaint is that the drawing of race-conscious districts is inherently unconstitutional or that, at least, the drawing of two majority-minority districts in North Carolina is necessarily unconstitutional when the districts are allegedly designed to guarantee the election of two minority members of Congress. As Plaintiffs candidly concede in their brief, it makes no difference to their case "whether or not the State Appellees accepted fully a redistricting plan suggested by the Attorney General." Appellants' Brief on the Merits, pp. 78-79 (hereafter "Pl.Br.").

As the District Court noted, Plaintiffs are white residents in a majority-white state with a majority-white legislature. They do not allege, and cannot plausibly allege, that the state Defendants discriminated against them as white voters with the invidious intent essential to a successful racial gerrymandering claim. Plaintiffs' status as white voters in North Carolina,

given the racial composition of the State and of the legislature and the fact that ten of the State's twelve congressional districts are majority-white, forecloses any contention that the state Defendants acted with an intent to harm them because they are white. The complaint, accordingly, makes no such allegation. Thus, in this case, based on the complaint and theories propounded by the Plaintiffs, it makes no difference whether the legislature did or did not accede to any "plan suggested by the Attorney General" because Plaintiffs do not and cannot allege an intent to harm them specifically as white voters.

This case does not present the Court with any other challenges to the validity of the State's Plan. The State's congressional districts conform to the one-person, one-vote requirement as closely as is mathematically possible. The Plaintiffs have expressly disavowed any claim of political gerrymandering, Pl.Br. at 12, and do not ask this Court to craft federal constitutional standards governing the shape or compactness of congressional districts.<sup>12</sup>

See J.S. App. at 18a, 23a. Of the 120 state House seats, fourteen were held by African-Americans and one by a Native American at the time the Plan was adopted. Five of the fifty state Senators were African-American.

In its opinion, the District Court noted that the complaint does not actually state Plaintiffs' race and alleges injury not to the Plaintiffs as members of a particular race, but to all North Carolinians of all races. J.S. App. at 17a. Because taking this reticence literally would make the complaint "self-defeating" on its face, the District Court took judicial notice of the fact that the Plaintiffs are (continued...)

<sup>11(...</sup>continued)

white and construed the complaint to allege injury based on that racial identity. Id. at 17a-18a. Before this Court, the Plaintiffs suggest at one point that two of their number have been injured by the Plan as "registered white voters" in one of the majority-minority districts, Pl.Br. at 44, but their fundamental claim remains one of injury to "North Carolina voters -- white and black." Id. at 45. See also id. at 67, 69 (describing the injury as one to "registered voters"). At least as a technical matter, therefore, Plaintiffs appear to lack standing. See Schlesinger v. Reservists Committee, 418 U.S. 208, 227-28 (1974) (injury to the "generalized interest" of all citizens in constitutional governance is too abstract to support standing).

The Plaintiffs' allegation about the shape of the State's congressional districts is a statement of the injury they assert they have suffered rather than a free-standing constitutional claim. See Comp. ¶ 26, J.S. App. at 86a-87a. This Court's decision in Pope v. Blue already has rejected claims that the Plan violates constitutional standards of contiguity and compactness or is irrational. See Jurisdictional Statement of Appellants, Pope v. Blue at i (questions presented). (continued...)

The Plaintiffs' claim under the Voting Rights Act rests entirely on their race-based constitutional argument. See Amendment to Comp. ¶ 2(A), J.S. App. at 104a-05a.<sup>13</sup>

In the remainder of this Brief, the state Defendants will analyze Plaintiffs' theories and the relevant case law to demonstrate why Plaintiffs' complaint was properly dismissed and why they cannot succeed on their complaint, an analysis which demonstrates why, at least in the context of this case, the allegation that the State acted with the intent to comply with the Voting Rights Act precludes a finding of invidious discriminatory intent even if the legislature did not accede to a "plan suggested by the Attorney General."

- I. THE NORTH CAROLINA LEGISLATURE'S INTENT TO COMPLY WITH THE VOTING RIGHTS ACT AND THE ATTORNEY GENERAL'S INTERPRETATION THEREOF PRECLUDES A FINDING THAT THE LEGISLATURE'S CONGRESSIONAL REDISTRICTING PLAN WAS ADOPTED WITH INVIDIOUS DISCRIMINATORY INTENT.
  - A. PLAINTIFFS MAKE NO ALLEGATION THAT THE LEGISLATURE ACTED WITH INVIDIOUS INTENT AS THIS COURT EMPLOYS THAT TERM.

The Plaintiffs' claim of racial discrimination is simple and straightforward: the General Assembly's purposeful use of race in redistricting, motivated by its desire to comply with the Voting Rights Act as interpreted and administered by the Attorney General, in and of itself constitutes the invidious discriminatory intent necessary to state an equal protection claim. See Comp. ¶ 36(A). This claim is flatly contrary to settled law. In the

<sup>12(...</sup>continued)

In light of that fact, and of the Plaintiffs' statement that they "in no way adopt or incorporate the contentions" of the *Pope* plaintiffs, Comp. ¶ 19, J.S. App. at 82a, the suggestion in the brief amicus curiae of the Republican National Committee that this appeal presents such questions is insupportable.

The Plaintiffs' statutory argument assumes that their constitutional claim is well-founded and asserts that this Court therefore must construe the Act to forbid the actions of the federal and state Defendants or declare the Act unconstitutional pro tanto.

The Plaintiffs allege violations of the Fifteenth Amendment, and of the Fifth Amendment by the federal Defendants, as well as of the Equal Protection Clause. For the purposes of this appeal, however, these provisions need not be treated separately: plaintiffs alleging racial discrimination in violation of each must be able to allege the presence of invidious intent in the challenged governmental action. See Washington v. Davis, 426 U.S. 229, 240 (1976) (Equal Protection Clause); City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion) (Fifteenth Amendment); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (Court's "approach to Fifth Amendment equal protection claims" is "precisely the same as to equal protection claims under the Fourteenth Amendment"). For the sake of brevity, this Brief will discuss the Plaintiffs' claims in terms of "equal protection."

Plaintiffs correctly note that the state Defendants acknowledge that the legislature acted in a race-conscious manner, Pl.Br. at 21, but their conclusion that all "material facts are undisputed," id. at 81, is premature. Because the Defendants prevailed on a Rule 12(b)(6) motion to dismiss, they have not as yet (continued...)

absence of any claim about pretext, the Plaintiffs' affirmative statement that the purpose of the legislature's action was compliance with the Act precludes the possibility that the legislature's intent was invidious in the constitutional sense.<sup>16</sup>

This Court often has observed that it is a "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976). The Court has emphatically reaffirmed this principle in the area of voting rights: "[A] showing of discriminatory intent has long been required in all types of equal protection cases charging racial discrimination," Rogers v. Lodge, 458 U.S. 613, 617 (1982), including cases such as the present that allege an unconstitutional dilution of a racial group's voting strength. Id. 17

The Plaintiffs therefore must allege that the Plan was enacted with a racially invidious intent in order to state a claim. The District Court correctly dismissed the action because the Plaintiffs have not alleged invidious intent in the sense in which this Court's precedents use that term.

According to the Plaintiffs, all that need be alleged to state an equal protection claim, at least with respect to intent, is that the state legislature knowingly drew up a reapportionment plan that contains two districts in which black voters are in a majority. It is that purposeful action, Plaintiffs assert, that embodied "a racially discriminatory intent and purpose, regardless of [the legislature's motives." Comp. ¶ 36(A). As the District Court below correctly concluded, "this of course is not . . . the meaning of 'invidious' discrimination in equal protection jurisprudence." J.S. App. at 23a. "Simply put . . . the plaintiffs here have not alleged -- nor could they prove under the circumstances properly before us on this record -- an essential element of their equal protection (and parallel Fifteenth Amendment) claim: that the redistricting plan was adopted with the purpose and effect of discriminating against white voters such as plaintiffs on account of their race." Id. at 22a-23a.

<sup>15(...</sup>continued) answered the complaint. For the purposes of the present appeal, of course, all factual allegations in the complaint must be taken as true.

This action therefore is fundamentally unlike cases such as Quilter v. Voinovich, 794 F. Supp. 695 (N.D. Ohio 1992), prob. jur. noted, 112 S. Ct. 2299 (1992), which involve allegations of pretext. In Quilter, the plaintiffs alleged that the state legislature's professed intent to comply with the Voting Rights Act was in fact a pretext and that the actual purpose and effect of the legislature's legislative redistricting was to harm racial minority voters "under the guise of protecting minority rights." 794 F. Supp. at 698. The district court's holding in Quilter that the state legislature had an inadequate legitimate basis for its "wholesale" creation of majority-minority districts rested directly on its perception of "the pitfalls which arise from a per se application of majority-minority districting, i.e., minority vote dilution [in violation of § 2 of the Voting Rights Act] can result from the concentration of minorities in districts." Id. at 702 n.2. In the present case, in contrast, the Plaintiffs have made no assertion that the State's purpose was anything other than what it purported to be, and they make no claim that the State's Plan violates § 2 of the Act.

The Court recently reiterated the applicability of the invidious intent requirement to vote dilution claims in *Davis v. Bandemer*, 478 U.S. 109, 129 & n.11 (1986) (plurality opinion). *See also id.* at 171 n.10 (Powell, J., dissenting) (continued...)

<sup>17(...</sup>continued)

<sup>(</sup>voting rights cases "have construed the Equal Protection Clause to require proof of intentional discrimination . . . In none of those cases was the Court willing to assume discriminatory intent"). Racial vote dilution cases thus differ from cases in which government makes formal use of race or some other suspect classification as the express basis on which to differentiate between individuals. In vote dilution cases such as the present action, no one is being denied the relevant public good (the right to vote), and the formal classification the legislature is employing to organize the exercise of the franchise is geographic rather than racial.

The word "invidious" itself suggests the flaw in the Plaintiffs' argument: it is not every race-related decision that the Equal Protection Clause bans, but only those that flow from "prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). It is clearly settled law that governmental awareness that a decision will have a specific impact on a protected class or activity does not by itself constitute the invidious intent necessary to make out an equal protection claim. In the leading case, Personnel Administrator v. Feeney, 442 U.S. 256 (1979), the Court rejected the argument that a state program giving an absolute preference in civil service employment to veterans was an unconstitutional discrimination on the basis of sex because the state legislature knew that the preference would have a greatly disproportionate impact on men and women.18 The Court noted that the legislature must have been aware that "most veterans are men" and that "[i]t would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable." Id. at 278. Despite these facts, the plaintiff had not and could not show the presence of invidious intent in the constitutional sense.

"Discriminatory purpose," . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at 279 (citations omitted). Because there was no allegation that any part of the state's purpose was to harm women, as opposed to benefitting veterans, the plaintiff had failed to state an equal protection claim.

Feeney thus clearly distinguished situations where (as in Feeney) a legislature acts to aid one group without any affirmative intention of harming another and those in which at least part of the legislature's purpose in acting is to harm a targeted group. Invidious intent "means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982) (discussing concept in constitutional and Title VII disparate treatment cases). Government acts with invidious racial intent only if the decision challenged was made because the decisionmaker viewed the negative effects on a racial group as a "good" that it was pursuing.19 In cases involving redistricting, the Court repeatedly has held that a legislative apportionment denies equal protection only if its affirmative purpose is "to minimize or cancel out the voting potential of racial or ethnic minorities." City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion). Accord, Rogers v. Lodge, 458 U.S. at 617.

The Court's most recent decision interpreting the concept of invidious intent reaffirmed the Davis-Feeney understanding. In Bray v. Alexandria Women's Health Clinic, \_\_\_ U.S. \_\_\_, 113 S.

<sup>&</sup>lt;sup>18</sup> This Court has expressly applied Feerley's interpretation of invidious intent to race-based equal protection claims. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

<sup>&</sup>lt;sup>19</sup> See, e.g., Rogers v. Lodge, 458 U.S. 613, 617 (1982) (intent shown if the state action is a "purposeful device to further racial discrimination"); Whitcomb. v. Chavis, 403 U.S. 124, 149 (1971) (same); City of Richmond v. United States, 422 U.S. 358, 378 (1975) (Constitution forbids actions that constitute "gross racial slurs, the only point of which is 'to despoil colored citizens'"). See Brest, In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 13 (1976) (legislature acts with unconstitutional racial purpose when it gives "positive weight to the impermissible factor of racial prejudice").

Ct. 753 (1993), 20 the Court held that anti-abortion protesters could not be found liable under 42 U.S.C. § 1985(3), because opposition to abortion is not a form of the "class-based, invidiously discriminatory animus" (in the Bray context, animus against women' required under the statute. Id. at 758. The respondents had not shown that the protesters' actions embodied "a purpose that focuses upon women by reason of their sex" or were motivated "by a purpose (malevolent or benign) directed specifically at women as a class." Id. at 758 (emphasis added). The Court stressed the link between invidious animus and "hatred of or condescension toward" the class against whom the animus supposedly is directed, id. at 760, and cited Feeney for the familiar proposition that awareness of or even indifference about the disparate impact on a protected class does not constitute invidious intent. Id. at 760-61 & n.4.21 In the light of Bray, it is clear that the District Court below correctly dismissed the Plaintiffs' complaint: the Plaintiffs have not alleged that the legislature's purpose was "focused upon" or "directed specifically at" white voters as a class, and still less that the legislature was motivated by

"hatred of or condescension toward" white voters. Their complaint, therefore, does not allege a violation of equal protection.

The Plaintiffs, with admirable candor, have not made the facially implausible allegation that the white-majority North Carolina General Assembly that enacted the Plan did so "because of" its supposed adverse effects on white voters (Feeney) or "to further racial discrimination" against white voters (Rogers). In the terms this Court employed in Feeney, the Plaintiffs' argument is that the legislature's "invidious" intent was its race-conscious decision to create two majority-minority districts "in spite of" any adverse effect on white voters. See Comp. ¶ 36(A). The Plaintiffs thus are asking the Court to repudiate the settled understanding of invidious intent. They have not, however, successfully executed the difficult task of demonstrating why this Court should discard so central an element of constitutional law.

- B. THE PLAINTIFFS' ARGUMENTS IN SUPPORT OF THEIR PROPOSED REVISION OF EQUAL PROTECTION DOC-TRINE ARE UNCONVINCING.
  - Plaintiffs' Revisionist Interpretation of Invidious Intent is Contrary to The History and Purpose of the Equal Protection Principle.

The Plaintiffs propose that this Court adopt the principle that the Constitution imposes a blanket prohibition on all race-conscious governmental action, and in support of this proposal, they suggest that the Equal Protection Clause already mandates what they call a "color-blind Constitution." Pl.Br. at 33-34.<sup>22</sup>

<sup>&</sup>lt;sup>20</sup> Although *Bray* is a statutory decision, its discussion is fully relevant to the present case because the Court itself equated the "invidiously discriminatory animus" necessary to state a § 1985(3) claim and the invidious intent required in alleging an equal protection violation. *See Bray*, 113 S. Ct. at 760-61 & n.4.

As the Bray Court noted, the concept of invidious purpose or animus is not a psychological one. "We do not think that the 'animus' requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious) discrimination against women. It does demand, however, at least a purpose that focuses upon women by reason of their sex." Id. at 759. A decisionmaker whose intent was to prevent minority citizens from voting would be acting on the basis of an "objectively invidious" intent even if he or she genuinely believed that those citizens would be better off without the franchise. What is missing from the Plaintiffs' allegations is the element of adverse focus which Bray emphasized as essential: the Plaintiffs have not alleged that the legislature acted with a purpose "that focuses upon [white voters] by reason of their [race]."

The terminology of "color-blindness" comes most immediately, of course, from the first Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Justice Harlan's famous statement that "Our Constitution is color-blind," (continued...)

This proposal is contrary both to the original meaning of the Equal Protection Clause and to the cases interpreting the Clause. As both this Court and many commentators have observed, "[t]he concept of benign race-conscious measures . . . is as old as the Fourteenth Amendment." *Metro Broadcasting v. FCC*, 497 U.S. 547, \_\_\_\_, 110 S. Ct. 2997, 3008 n.12 (1990).<sup>23</sup> There is little or no basis on which to argue that the original intent of the framers and ratifiers of the Fourteenth and Fifteenth Amendments was to prohibit all race-conscious measures intended to benefit racial minorities.<sup>24</sup>

The Court's seminal equal protection case, Strauder v. West Virginia, 100 U.S. 303 (1879), described the Reconstruction amendments' ban on racial discrimination as conferring on African-Americans "the right to exemption from unfriendly legislation against them distinctively as colored," id. at 307-08, not as a blanket prohibition on race-conscious legislation. Cf. City of Memphis v. Greene, 451 U.S. 100, 128 (1981) (foreseeable disparate impact on racial minority did not amount to "a form of stigma so severe as to violate the Thirteenth Amendment"). The holding in Washington v. Davis that allegation and proof of invidious purpose is a necessary part of an equal protection case merely "reaffirmed a principle well-established in a variety of contexts." Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265 (1977). See Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 295 (1991) (Davis restated "the traditional understanding of equal protection rights [that] acknowledged a constitutional violation only when a particular group had been deliberately disadvantaged"). The Fifteenth Amendment cases are equally clear: in Gomillion v. Lightfoot, 364 U.S. 339 (1960), for example, the Court held that the plaintiffs had stated a cause of action because their allegations, if proven, showed that the legislature had "single[d] out a readily isolated segment of a racial minority for special discriminatory treatment" and had redrawn municipal boundaries in order to deprive black citizens "of the benefits of residence" within the city

<sup>22(...</sup>continued)

id. at 559, is not the clear endorsement of a per se ban on race-conscious state action that the Plaintiffs take it to be. The substantive ground of Harlan's objection to de jure racial segregation was that segregation laws "proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed" to associate with white citizens. Id. at 560. Harlan would have ruled the segregation law at issue in Plessy unconstitutional precisely because its makers had acted "because of" the law's adverse effects on black citizens: Harlan's "color-blind Constitution" embodied the Feeney principle of invidiousness rather than the Plaintiffs' proposed revision. Siee also id. at 563 (Harlan, J., dissenting) (majority's decision upholds legislation "conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race").

See, e.g., Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 315 (1991) (neither language nor history of Equal Protection Clause requires "conclusion that all racial classifications are suspect"); Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985) (the original understanding of the Amendment did not prohibit all race-conscious legislation); Ely, The Constitutionality of Reverse Race Discrimination, 41 U. Chi. L. Rev. 723, 728 (1974) ("historical meaning and function" of the Fourteenth Amendment was to prohibit "discrimination against Blacks," not to ban all race-conscious measures).

As Judge Richard Posner once observed, the original-intent argument against non-invidious race-conscious measures "ha[s] no leg to stand on." Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1, 21-22. The most recent study to address the historical questions concludes that the evidence about the Fourteenth Amendment's original purpose "tends strongly to refute" the contention that "the (continued...)

<sup>24(...</sup>continued)

Fourteenth Amendment was intended by its framers to require color blindness on the part of government." A. Kull, *The Color-Blind Constitution* vii (1992). See id. at 53-87 (discussing the evidence). Professor Kull's evident sympathy on principle for a per se ban on race-consciousness, id. at 220-24, renders his historical conclusions about it particularly persuasive.

as a voting unit. *Id.* at 346, 341.25 See also Bolden, 446 U.S. at 62 (plurality opinion); *id.* at 102 (White, J., dissenting).

The requirement that plaintiffs allege the presence of an actual and invidious intent in order to state an equal protection claim plays a central role in equal protection doctrine. First, it directly embodies the "central purpose" of the Equal Protection Clause, Davis, 426 U.S. at 240, which is to deny any "legitimacy" to an "official action . . . taken for the purpose of discriminating against [African-Americans] on account of their race." City of Richmond v. United States, 422 U.S. 358, 378 (1975) (emphasis added). Recent decisions have stressed that the Clause's command is general and thus protects all racial groups. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-96 (1989) (plurality opinion). Those very decisions, however, have reiterated the Court's insistence that the concern of the equal protection principle is with the pernicious effects of "illegitimate racial prejudice or stereotype" in public decisionmaking. Id. at 493.

The invidious intent requirement also serves a crucial role in defining those governmental decisions susceptible to invalidation on equal protection grounds. If simple awareness that a decision will have a racially disproportionate effect satisfied the intent requirement, many governmental programs would be vulnerable to challenge despite their legitimate purposes. See Davis (rejecting a claim based on racially disparate effects of standardized testing);

McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting a claim based on statistical disparities in racial impact of capital sentencing law). The Plaintiffs' proposed redefinition of invidious intent would broaden the range of potential equal protection claims in a fashion unjustified by reference to the central purpose of the equal protection principle. The definition they would have this Court adopt lacks principled limits in a world in which governmental units have increasing access to sophisticated data about the racial and other consequences of their decisions. Gaffney v Cummings, 412 U.S. 735, 753-54 (1973) (inevitable that lawmakers know the political impact of the districts they create). The Plaintiffs have offered no persuasive reason why this Court should overrule the many cases establishing the meaning of invidious intent and replace them with a concept fraught with uncertainty.

 This Court's Decisions Do Not Compel or Even Support the Plaintiffs' Reinterpretation of the Invidious Intent Requirement.

The Plaintiffs base much of their argument on a faulty understanding of the cases they cite and deny the relevance of the decision the District Court held to be "directly on point." J.S. App. at 19a. None of the decisions that supposedly advance their contention that the Constitution should be read to impose a per se ban on race-conscious redistricting in fact does so. 26 In particu-

<sup>&</sup>lt;sup>25</sup> Contrary to Plaintiffs' reading of Gomillion, Pl.Br. at 30-31, that decision did not rest on a per se ban on race-consciousness, but on the adequacy for Fifteenth Amendment purposes of an allegation that the redrawn municipal boundaries in dispute were "a device to disenfranchise Negro citizens" literally, by placing them outside the city limits. 364 U.S. at 341. See Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 951-52 (1989) (Gomillion concerned the pretextual use of district lines for covert purpose of disqualifying black voters).

This Court's one-person, one-vote decisions, Pl.Br. at 22-29, simply are not relevant to a race-based equal protection claim, and Plaintiffs did not and could not allege that the State's congressional districts do not satisfy the equal population mandate of Article I Section 2. See Beer v. United States, 425 U.S. 130, 142 n.14 (1976) (one-person, one-vote decisions "are not relevant" in evaluating a race-based challenge to legislative reapportionment); Davis v. Bandemer, 478 U.S. 109, 150 (1986) (O'Connor, J., concurring) (there is no "vote dilution" in the Reynolds v. Sims sense as long as the equal population requirement is satisfied).

lar, the Court's recent line of decisions forbidding the racially discriminatory use of peremptory challenges, on which the Plaintiffs place special emphasis, Pl.Br. at 33-39, expressly rest on and endorse the *Feeney* understanding of invidious intent. *See*, e.g., *Hernandez v. New York*, 500 U.S. \_\_\_, \_\_\_, 111 S. Ct. 1859, 1866 (1991).<sup>27</sup>

The Plaintiffs seek to avoid the authority of *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), which, as the District Court noted, "flatly foreclose[s]" their claim. J.S. App. at 19a. In *U.J.O.*, the Attorney General denied preclearance to a state redistricting plan and in turn "the State sought to meet what it understood to be the Attorney General's objections and to secure his approval" by creating additional majority-minority districts. *Ia.* at 151. When the Attorney General precleared the revised plan, white voters<sup>28</sup> challenged it as a racial gerrymander violating the Fourteenth and Fifteenth Amendments, and this Court held that they had failed to state a claim. A majority of the Court applied the traditional *Washington v. Davis* understanding of unconstitutional discrimination and agreed that the *U.J.O.* plaintiffs

had not alleged an invidious racial intent to harm white voters: "There is no doubt that in preparing the 1974 legislation the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race." *Id.* at 165 (White, J., joined by Stevens and Rehnquist, JJ.). *See id.* at 179-80 (Stewart, J., joined by Powell, J.). A slightly different majority agreed that the state's plan was valid because it was enacted in order to comply with § 5 of the Voting Rights Act. *See id.* at 159-61 (White, J., joined by Brennan, Blackmun, and Stevens, JJ.); *id.* at 180 (Stewart, J., joined by Powell, J.). 30

The Plaintiffs deny the dispositive force of *U.J.O.* in several ways, none of which is persuasive. Their suggestion that the decision is "a dangerous relic from the past," Pl.Br. at 40, incorrectly treats *U.J.O.* as though it were an isolated case out of step with the rest of this Court's jurisprudence: in fact, *U.J.O.* is a consistent application both of the general principle of invidious intent and of the Court's specific interpretation of § 5. *See infra*, at 27-31. The Plaintiffs' lengthy discussion of the social risks that may be associated with race-conscious redistricting, Pl.Br. at 41-46, is an argument about the policies that the United States Congress and the North Carolina General Assembly have adopted, and it is sufficient to reply that such policy considerations are

Recent decisions applying heightened scrutiny to affirmative action programs, Pl.Br. at 52-53, are also consistent with the traditional understanding of invidious intent. Croson, 488 U.S. at 493 (purpose of strict scrutiny is to "'smoke out' illegitimate uses of race"). Cf. Lamprecht v. FCC, 958 F.2d 382, 393 n.3 (D.C. Cir. 1992) (Thomas, Circuit Justice) (purpose of heightened scrutiny of sex-based affirmative action is to insure that the measure is not based on "archaic stereotypes"). The Croson line of decisions, in other words, employs strict scrutiny in order to determine whether the hidden motivation behind the overt use of race to distribute public goods is in fact invidious in the Davis-Feeney sense.

Although the plaintiffs in *U.J.O.* were members of a Hasidic Jewish community that was fractured by the state's new plan, the only contention presented to this Court was that "the use of racial criteria by the State of New York in its attempt to comply with § 5 of the Voting Rights Act" was unconstitutional discrimination against white voters. 430 U.S. at 148.

This same majority of Justices thus recognized the affirmative power of the states to use race-conscious redistricting to protect the voting power of racial minorities. See 430 U.S. at 165-68 (White, J.); id. at 180 & n.\* (Stewart, J.).

In fact, the lone dissenter in U.J.O., Chief Justice Burger, accepted the constitutionality of race-conscious redistricting that is "reasonably necessary to assure compliance with federal voting rights legislation," Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (Burger, C.J.) (citing his dissent in U.J.O.), and objected only to the fact that the state had "mechanically adhered" to a 65% figure for creating adequate majority-minority districts. U.J.O., 430 U.S. at 183 (Burger, C.J., dissenting).

within the competence of legislatures to weigh.<sup>31</sup> Their observation that Durham County, in which they live, is not covered by § 5, *id.* at 65-66, is not germane since they are challenging a statewide plan that must be precleared.<sup>32</sup>

The Plaintiffs also suggest that this Court's affirmative action decisions have in some fashion undermined the validity of the cases approving race-conscious redistricting, id. at 48, 63; however, they neither explain nor even acknowledge the fact that Justices of this Court have repeatedly observed that the continuing validity of cases such as *U.J.O.* is unaffected by the Court's application of heightened scrutiny in the affirmative action context. See Metro Broadcasting, 110 S. Ct. at 3019; Wygant v. Jackson Bd. of Education, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in the judgment); Fullilove v. Klutznick, 448 U.S. 448, 524 n.3 (1980) (Stewart, J., dissenting); Regents of Univ. of

California v. Bakke, 438 U.S. 265, 304-05 (1978) (Powell, J.). U.J.O. is entirely consistent with this Court's current understanding of the equal protection principle, and under it the Plaintiffs plainly have not stated a cause of action.

C. THE PLAINTIFFS' PROPOSED REINTERPRETATION OF INVIDIOUS INTENT WOULD REQUIRE THIS COURT TO INVALIDATE KEY PROVISIONS OF THE VOTING RIGHTS ACT AND TO REPUDIATE ITS DECISIONS INTERPRETING THE ACT.

The Plaintiffs assert that "if the Voting Rights Act does permit or authorize a State legislature to create Congressional Districts with [a race-conscious] intent or purpose," the Act should be held unconstitutional "to that extent and in that regard." Amendment to Comp. ¶ 2(A), J.S. App. at 104a-05a. In making such an argument, the Plaintiffs ask this Court to reject the considered constitutional judgment of the successive Congresses that have extended and strengthened the Act and to repudiate its own precedents recognizing the validity of race-conscious state action taken in order to comply with the Act. The Plaintiffs have not carried the very heavy burden of persuasion that they have undertaken.

States Covered By the Preclearance Requirements of the Voting Rights Act Have the Constitutional Authority to Create Majority-Minority Districts in Order to Fulfill Their Section Five Obligations.

"[T]he Fifteenth Amendment places responsibility on the states for protecting voting rights," Senate Report No. 97-417, reprinted in 1982 U.S. Code Cong. & Admin. News 235 (hereaf-

<sup>31</sup> The Plaintiffs remark with considerable understatement that their policy arguments "are not of themselves a complete justification for" invalidating the State's Plan, but suggest that those arguments support their legal contentions. Pl.Br. at 45-46. They fail to acknowledge that responsible commentators vigorously contest their views. A recent study of race-conscious redistricting under the Voting Rights Act, for example, concludes that "there seems to be no factual basis for asserting that enforcement of the Voting Rights Act has led to an increase in racial polarization by making race a more salient feature of politics than it had been previously." B. Grofman, L. Handley & R. Niemi, Minority Representation and the Quest for Voting Equality 132 (1992). In any event, the responsibility for weighing the costs and benefits of the Act belongs to Congress. Cf. Gingles v. Edmisten, 590 F. Supp. 345, 356-57 (E.D.N.C. 1984), rev'd in part on other grounds sub nom. Thornburg v. Gingles, 478 U.S. 30 (1986): in eliminating an intent requirement from § 2, "Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values [including the risk that] the imposing of affirmative obligation upon government to secure [minority group voting] rights by raceconscious electoral mechanisms was alien to the American political tradition."

<sup>&</sup>lt;sup>32</sup> In determining the validity of a statewide redistricting plan, it is necessary to look at the "overall effect" statewide and not merely at isolated areas. *Connor v. Finch*, 431 U.S. 407, 427 (1977) (Blackmun, J., concurring in the judgment).

ter "Sen.Rep. 97-417"). However, in addition to this fundamental constitutional responsibility, § 5 of the Voting Rights Act places additional responsibilities and limitations on certain states. Section 5 imposes on covered jurisdictions an affirmative obligation to demonstrate that changes in their electoral laws are free both of invidious purpose and of discriminatory effect. See McCain v. Lybrand, 465 U.S. 236, 247 (1984); Beer v. United

States, 425 U.S. 130 (1976). Because § 5 coverage rests on findings that a jurisdiction has "engaged in certain violations of the Fifteenth Amendment," *McCain*, 465 U.S. at 244-45, covered jurisdictions have a "constitutional duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." Wygant, 476 U.S. at 291 (O'Connor, J., concurring in the judgment) (discussing U.J.O.). North Carolina is, in effect, a covered jurisdiction for congressional redistricting purposes, and thus the legislature's general authority to redistrict and to protect voting rights is reenforced by its responsibility and power to satisfy the requirements of § 5.

This Court approved the creation of majority-minority districts as a means of satisfying a covered jurisdiction's obligations under § 5 in the leading case construing the provision. Beer v. United States, 425 U.S. 130 (1976), concluded that § 5 forbids the implementation of a redistricting plan that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Id. at 141. Under that standard, the Court held that the plan under review in

<sup>33</sup> Legislative redistricting, including the reapportionment of seats for the United States House of Representatives, is "primarily the duty and responsibility of the State," Chapman v. Meier, 420 U.S. 1, 27 (1975), and state legislatures have plenary authority within constitutional limits to pursue legitimate goals and implement state policies. White v. Weiser, 412 U.S. 783, 795 (1973); Carrington v. Rush, 380 U.S. 89, 91 (1965). Even in the absence of the Voting Rights Act. it would seem that states could employ non-invidious race-conscious measures in order to eliminate the effects of racial discrimination on the access of minority group members to the electoral process. See U.J.O., 430 U.S. at 165-68 (White, J.); City of Rome v. United States, 446 U.S. 156, 212 n.5 (1980) (Rehnquist, J., dissenting). In Gaffney v. Cummings, the Court rejected a political gerrymandering challenge to a redistricting plan intended to create a fair balance between the major political parties. In doing so, the Court emphatically stated with respect to "racial or political groups" that "neither we nor the district courts have a constitutional warrant to invalidate a state plan . . . because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S. at 754. The Court's seminal racial vote-dilution decisions under the Constitution also concluded that where "an identifiable racial or ethnic group had an insufficient chance to elect a representative of its choice . . . district lines should be redrawn" as a remedy. Davis v. Bandemer, 478 U.S. 109, 124 (1986) (analyzing earlier cases). See also id. at 151 (O'Connor, J., concurring) (members of "a racial minority group [that] is characterized by 'the traditional indicia of suspectness' and is vulnerable to exclusion from the political process" are entitled to "some measure of protection against intentional dilution of their group voting strength"). Plaintiffs do not even discuss why these cases, and the Court's identification of "fair group representation" as a value of constitutional dimensions, Bandemer, 478 U.S. at 125 & n.9, do not provide an adequate basis for the State's raceconscious redistricting.

<sup>&</sup>lt;sup>34</sup> States or local governmental units are covered if they have an identifiable history of discrimination under the criteria established by Section 4 of the Act, 42 U.S.C. § 1973b.

Jurisdictions covered by § 5 of the Voting Rights Act thus are under an affirmative obligation to eliminate the vestiges of past racial discrimination in their electoral systems that parallels the "duty and responsibility of a school district once segregated by law . . . to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system." Freeman v. Pitts, \_\_\_\_ U.S. \_\_\_\_, 112 S. Ct. 1430, 1443 (1992). The Plaintiffs' statement that the legislature had no basis on which to believe that official racial discrimination has infected North Carolina's congressional elections, Pl.Br. at 19, flies in the face of the fact that forty counties in the State are covered under the Act and that as a result all statewide redistricting must be precleared. The 1982 extension of § 5 was based on Congress's conclusion that maintaining its affirmative obligations "is still vital to protecting voting rights in the covered jurisdictions." See Sen.Rep. 97-417 at 186-92 (discussing Congress's decision to extend § 5 but not to make it nationwide because of its "extensive Congressional findings of voting discrimination" in covered jurisdictions).

Beer, which created a majority-minority district where none had existed before, was "an ameliorative new legislative apportionment [which] cannot violate section 5 unless the new apportionment so discriminates on the basis of race or color as to violate the Constitution." The "ameliorative" aspect of the Beer reapportionment consisted in the fact that it involved deliberate, race-conscious redistricting for the purpose of creating a majority-minority district and thus "enhanc[ing] the position of racial minorities."

Id. at 141. See App. in Beer v. United States, O.T. 1975, No. 73-1869, at 341-42 (district lines intentionally drawn to attain at least a 54% black majority in one district).36

This Court's other § 5 decisions echo Beer's approval of race-conscious redistricting for the purpose of complying with § 5. In City of Richmond v. United States, for example, the Court held that a city could satisfy § 5's requirements where annexations of new territory decreased the overall percentage of black voters by adopting a race-conscious post-annexation redistricting plan that purposefully assured black voters "representation reasonably equivalent to [their] political strength in the enlarged community." 422 U.S. at 370-71. Accord, City of Port Arthur v. United States, 459 U.S. 159, 167 (1982) (approving race-conscious redistricting to insure that the plan "adequately reflected the political strength of the black minority;" id. at 171, 175 (Powell, J., dissenting) (same); U.J.O., 430 U.S. at 159-61 (White, J.); id. at 180 (Stewart, J.); id. at 183 (Burger, C.J., dissenting); City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), aff'd mem., 410 U.S. 962 (1973). See also Upham v. Seamon,

456 U.S. 37, 43 (1982) (in devising a congressional reapportion-ment plan after the Attorney General objected to the legislature's plan, the district court erred by failing to follow the legislature's decision to create a majority-minority district). The state Defendants' research indicates that other courts have uniformly accepted this understanding of the states' authority. See, e.g., Texas v. United States, 802 F. Supp. 481, 486 (D.D.C. 1992); Wilson v. Eu, 823 P.2d 545, 550-51, 582 (Cal. 1992).

Section 5 requires covered jurisdictions to avoid all changes in their election laws that have the effect of weakening the voting strength of voting minorities, and the burden rests on the jurisdiction to demonstrate that it has done so. Carrying out this task is impossible in many redistricting situations unless the jurisdiction takes race into account. This Court therefore has consistently approved the use of race-conscious measures by covered jurisdictions to satisfy their obligations under § 5.37 The Plaintiffs' argument necessarily asks the Court to repudiate all of those decisions and, finally, to reject the constitutionality of § 5 itself.38

<sup>&</sup>quot;[A]II eight Justices who participated in [Beer] implicitly accepted the proposition that a State may revise its reapportionment plan to comply with § 5 by increasing the percentage of black voters in a particular district until it has produced a clear majority." U.J.O., 430 U.S. at 160 (White, J.).

<sup>37</sup> The Senate Report accompanying the 1982 bill extending the Act noted that covered states possess "plenary power... to meet the standards of the Act." Sen.Rep. 97-417 at 235.

The Plaintiffs' claim that the implication of affirming the District Court will be to leave voters without a remedy against unconstitutional racial gerrymandering by state legislatures, Pl.Br. at 76-78, is baseless. This case does not present the Court with the specter of the Attorney General imposing, and the state legislature accepting, an unreasonable or outrageous prerequisite for preclearance, and it is contrary both to the structure of the Voting Rights Act and to principles of federalism gratuitously to assume that either the federal or the state officials would act in such a fashion. See Morris v. Gressette, 432 U.S. 491, 506 n.23 (1977). This case involves no allegation that the legislature's public goal of complying with § 5 of the Voting Rights Act was a pretext for a different, covert and unconstitutional purpose, and thus the District Court's decision in no way (continued...)

The Results Test of Section Two Requires
 States to Take Race Into Account in Redistricting in Order to Comply With the Section.

Section 2 of the Act was amended in 1982 to provide that no voting "standard, practice, or procedure shall be imposed of applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). In Gingles, this Court unanimously interpreted amended § 2 to prohibit state apportionment plans that dilute the voting strength of racial minorities by "caus[ing] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47. See id. at 87-88 (O'Connor, J., concurring in the judgment). 40

The "results" test of amended § 2 necessarily requires legislatures and courts attempting to comply with it to take race into account when redistricting. See Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 359-60 (7th Cir. 1992); DeGrandy v.

Wetherell, 794 F. Supp. 1076 (W.D. Fla. 1992), appeal pending as Wetherell v. DeGrandy, No. 92-519.41 As Justice O'Connor observed in Gingles, "the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice." 478 U.S. at 87 (opinion concurring in the judgment). The use of race-conscious redistricting thus is necessary if states are to be able to obey the mandate of amended § 2. Where necessary to avoid a situation in which members of a racial or linguistic minority have "less opportunity than other members of the electorate . . . to elect representatives of their choice," 42 U.S.C. § 1973(b), "[t]he deliberate construction of minority controlled districts is exactly what the Voting Rights Act authorizes." Garza v. County of Los Angeles, 918 F.2d 763, 776 (9th Cir. 1990). Numerous courts, therefore, have approved, ordered or implemented race-conscious apportionments that create majority-minority districts. See, e.g., Wesch v. Hunt, 785 F. Supp. 1491, 1498-99 (S.D. Ala. 1992), aff'd mem. sub nom. Camp v. Wesch, 112 S. Ct. 1926 (1992); Baird, 976 F.2d at 359-60; Jeffers, 730 F. Supp. at 217; DeGrandy, 794 F. Supp. at 1085; Wilson v. Eu, 823 P.2d at 549.

The North Carolina General Assembly was obligated, of course, to draw congressional districts that would not have the effect of diluting minority voting strength in order to comply with the mandates of § 2 and § 5. See 28 C.F.R. § 51.55(b)(2) (1992) (under § 5, Attorney General will deny preclearance to plans presenting clear violations of § 2). Faced with strong evidence of

<sup>&</sup>lt;sup>38</sup>(...continued) compromises the cognizability of claims based on an allegation of invidious intent in the traditional *Davis-Feeney* sense. *Cf. Quilter v. Voinovich*, 794 F. Supp. 695, prob. jur. noted, 112 S. Ct. 2299 (1992), where allegations of pretext were made.

<sup>&</sup>lt;sup>39</sup> The 1982 amendment was a response to this Court's decision in City of Mobile v. Bolden that § 2 was coextensive with the Fifteenth Amendment and that consequently to show a violation of the section a plaintiff would have to prove invidious intent. 446 U.S. at 61 (plurality opinion). Congress amended § 2 because, among other reasons, it concluded that the intent requirement "place[d] an unacceptably difficult burden on plaintiffs." Sen.Rep. 97-417 at 193.

While Gingles involved a challenge to multi-member legislative districts, other cases have upheld the application of the concept of vote dilution to challenges to the apportionment of single-member districts. See, e.g., Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989), aff'd mem., 111 S. Ct. 662 (1991).

The legislative history of the 1982 amendment indicates that Congress was aware of the fact that it was sanctioning majority-minority districts in appropriate circumstances. See Sen.Rep. 97-417 at 208 & n.121 (citing cases in which courts employed such districts in order to assure minority representation).

the existence of racially polarized voting in the State's elections, see Gingles, 478 U.S. at 80, the legislature had no other means of meeting that obligation. The Plaintiffs' reinterpretation of the invidious intent requirement would render all such attempts to comply with the Act unconstitutional. Since it is scarcely conceivable that Congress constitutionally can impose an obligation on the states that they cannot constitutionally fulfill, Plaintiffs' argument is in effect a challenge to the validity of §§ 2 and 5.42

 Sections Two and Five of the Voting Rights Act Are Constitutional, and the Plaintiffs' Challenge to Their Validity Should Be Rejected.

Sections 2 and 5 both require race-conscious redistricting, and in appropriate circumstances the creation of majority-minority districts, on the part of the states. The Plaintiffs' argument that the Constitution bars race-conscious redistricting is therefore an attack on the validity of those two key provisions of the Voting Rights Act. The constitutionality of that Act has been addressed on more than one occasion by this Court, and each time the Court has sustained the Act as an exercise of Congress's enforcement powers under the Reconstruction era amendments. See City of Rome; South Carolina v. Katzenbach, 383 U.S. 301 (1966). <sup>43</sup> It

is settled law that Congress possesses the authority under the Reconstruction era amendments to impose obligations and prohibitions on the states in the area of voting rights that go beyond the Fourteenth and Fifteenth Amendments' ban on invidiously intended discrimination. City of Rome, 446 U.S. at 177. Congress crafted §§ 2 and 5 of the Voting Rights Act in light of this principle and of the Constitution's guarantee to "racial minorities [of] the right to full participation in the political life of the community." Washington v. Seattle School District No. 1, 458 U.S. 457, 467 (1982). This Court should reject the Plaintiffs' request that it discard its own precedents and overturn the considered constitutional judgment of Congress.44

The states' constitutional power to meet the requirements of the Act is an unavoidable implication of Congress's power to enact it. "The government which has a right to do an act, and has imposed upon it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409-10 (1819).

<sup>43</sup> South Carolina and City of Rome sustained the pre-1982 version of the Act as an exercise of the enforcement power granted Congress by § 2 of the Fifteenth Amendment. See, e.g., City of Rome, 446 U.S. at 177. When Congress (continued...)

<sup>43(...</sup>continued)

amended the Act in 1982, it did so in part on the basis of a considered legislative judgment that the amendment properly rested on the enforcement powers granted Congress by § 5 of the Fourteenth Amendment as well. See Sen.Rep. 97-417 at 217-21. See also Briscoe v. Bell, 432 U.S. 404, 414-15 (1977) (Act rests in part on Fourteenth Amendment powers). The Act therefore is entitled to the special deference this Court accords exercises of Congress's "unique remedial powers... under section 5." Croson, 488 U.S. at 488 (O'Connor, J.). See also id. at 521-23 (Scalia, J., concurring in the judgment); Metro Broadcasting, 110 S. Ct. at 3008; id. at 3030 (O'Connor, J., dissenting); Katzenbach v. Morgan, 384 U.S. 641 (1966).

<sup>&</sup>lt;sup>44</sup> The 1982 Congress that amended § 2 and extended the entire Act carefully addressed the question of its constitutional authority to do so. See Sen.Rep. 97-417 at 217-21, 239-40.

II. THE STATE'S CONGRESSIONAL REDISTRICTING PLAN IS CONSTITUTIONAL EVEN ON THE ASSUMPTION THAT THE PLAINTIFFS ADEQUATE-LY HAVE ALLEGED DISCRIMINATORY INTENT BECAUSE THEY CANNOT ALLEGE DISCRIMINATORY EFFECT.

In addition to holding that the Plaintiffs failed to state a claim because they could not allege invidious intent, the District Court dismissed the Plaintiffs' complaint on a second and independent ground: "Neither have they alleged, nor could plaintiffs prove, the requisite unconstitutional effect under the facts indisputably before us on this motion." J.S. App. at 23a. This holding is plainly correct. The State's Plan creates no obstacles to the Plaintiffs' full participation in the political process and demonstrably cannot have the effect of "cancelling out" the electoral strength of white voters statewide.

In the cases originally outlining the elements of a racebased-equal protection claim, this Court held that plaintiffs must show that "the political processes leading to nomination and election [are] not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." White v. Regester, 412 U.S. 755, 766 (1973). The Court rejected arguments that an unconstitutional effect is shown by proving that a racial group is in the minority in a given district or that its preferred candidates lose elections: "the mere fact that one interest group or another concerned with the outcome of [the district's] elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system." Whitcomb v. Chavis, 403 U.S.

124, 154-55 (1971). See also Chapman v. Meier, 420 U.S. 1, 17 (1975) (plaintiffs must allege and prove "lessening or cancellation of voting strength" of group). The question of discriminatory effect is not determined by looking at particular "seats in isolation," Lockhart v. United States, 460 U.S. 125, 131 (1983) (§ 5 case), but by examining "the overall effect of the apportionment plan on the opportunity for fair representation of minority voters." Connor v. Finch, 431 U.S. 407, 427 (1977). In a case involving a statewide plan, therefore, the question of effect must be answered on a statewide basis. Chapman, 420 U.S. at 17; Davis v. Bandemer, 478 U.S. 109, 132-33 (1986) (plurality opinion). Recent decisions have adhered to the requirement that a viable equal protection claim must allege discriminatory effect as well as invidious intent. Bandemer, 478 U.S. at 119-20, 125-26;45 Turner v. Arkansas, 784 F. Supp. 553, 579 (E.D. Ark. 1991) (dismissing claim because no showing of discriminatory effect), aff'd mem., 112 S. Ct. 2296 (1992); Gingles v. Edmisten, 590 F. Supp. 345, 352 n.8 (E.D.N.C. 1984) ("dilutive effect remains an essential element of constitutional . . . claims"), aff'd in part and rev'd in part sub nom. Thornburg v. Gingles, 478 U.S. 30 (1986).

Under these decisions, the District Court's conclusion that the Plaintiffs have not made and cannot make the necessary allegation of discriminatory effect is plainly correct. The Plaintiffs' challenge necessarily is to the State's congressional reappor-

The Bandemer plurality opinion emphatically reaffirmed "the effects discussion we adopted earlier." 478 U.S. at 139 n.17. "[W]e have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. In those cases, the racial minorities asserting the successful equal protection claims had been essentially shut out of the political process." Id. at 139. The Plaintiffs' inability to allege that the racial group to which they belong has been "shut out" of the State's political process is fatal to their attempt to state a race-based equal protection claim.

tionment Plan, and thus the focus for determining discriminatory effect must be a statewide one. Viewed from that perspective, it is evident that the Plan does not have the effect of "cancel[ling] out or minimiz[ing] the voting strength" of the State's white citizens. White, 412 U.S. at 765. The creation of two majority-minority districts (out of twelve) obviously does not "consign" the white majority "to minority status," Bandemer, 478 U.S. at 125 n.9, and will not result in the proportional underrepresentation of white voters on a statewide basis. United Jewish Organizations v. Carey, 430 U.S. 144, 166 (1977) (White, J.).46 The "mere fact" that those Plaintiffs who live in a majority-minority district will find themselves "outvoted," Whitcomb, 403 U.S. at 154, would not state an unconstitutional effect even if it were more than mere conjecture. Their suggestion that Congresspersons elected under the Plan will not provide proper representation for white citizens, Pl.Br. at 39 n.10, 44-45, is an unacceptable speculation. "We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election." Bandemer, 478 U.S. at 132 (plurality opinion). This Court may take judicial notice of

the fact that as white voters the Plaintiffs cannot present the evidence of "historical patterns of exclusion from the political processes" of the State that would support a claim of discriminatory effect. *Id.* at 131 n.12. *See also White*, 412 U.S. at 766-67; *Rogers v. Lodge*, 458 U.S. 613, 625-27 (1982).

The Plaintiffs' argument, if accepted, leads to a perverse and illogical result: Plaintiffs, members of the racial group that constitutes a strong majority in the State's population, would be able to state an equal protection claim more easily than members of racial minorities, who are obligated under this Court's decisions to allege and prove that they have "essentially been shut out of the political process" of the State as a whole. *Bandemer*, 478 U.S. at 139 (plurality opinion); *id.* at 151-52 (O'Connor, J., concurring in the judgment). The Plaintiffs do not explain this consequence, and they have not attempted to distinguish this Court's cases establishing the effects requirement or, indeed, to discuss those cases at all. The Plaintiffs have not alleged a racially discriminatory effect, and on that basis this action should be dismissed.

- III. THE STATE'S CONGRESSIONAL REDISTRICTING PLAN IS CONSTITUTIONAL UNDER THIS COURT'S CROSON AND METRO BROADCASTING DECISIONS.
  - A. THE CROSON TEST DOES NOT APPLY TO RACE-CON-SCIOUS REDISTRICTING PURSUANT TO THE VOTING RIGHTS ACT.

The Plaintiffs argue in the alternative that the State's Plan is unconstitutional because it does not meet the requirements of this Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which applied strict scrutiny to invalidate a municipal public contracting program that provided preferential

The Plaintiffs suggest that the fact that there is a rough correspondence between the number of majority-minority districts under the Plan and the percentage of African-Americans in North Carolina's population renders the Plan suspect or invalid. Pl.Br. at 31-33. While this Court has repeatedly rejected arguments that racial groups are entitled to proportional representation, e.g., White, 412 U.S. at 765-66, it does not of course follow that proportional representation is unconstitutional. See, e.g., Bandemer, 478 U.S. at 130-31 (Constitution permits but does not require redistricting to produce results reflecting statewide strength of political groups); City of Mobile v. Bolden, 446 U.S. 55, 86 n.6 (1980) (Stevens, J., concurring in the judgment). Similarly, the proviso in § 2 of the Voting Rights Act stating that the section does not create a right to proportional representation does not mean that the section forbids proportionality. See, e.g., McGhee v. Granville Co., 860 F.2d 110, 120-21 (4th Cir. 1988).

treatment for various minority groups. The Plaintiffs have provided no explanation of why this Court should apply the *Croson* test, which the Court has developed to evaluate the constitutionality of programs that distribute public goods explicitly on the basis of race, rather than the Court's many decisions outlining the analysis to be employed in cases such as this one alleging a racial gerrymander. *Croson* and its progeny are not applicable in the present case because the analyses those decisions establish were designed to address concerns not present in this context.

In the situations addressed by the affirmative action cases, this Court has been confronted with the explicit governmental use of race as the criterion for allocating public goods such as access to a state medical school, public employment or public contracts. The decisions display concern over three aspects of such programs: by making explicit use of race, they can undercut the core purpose of the Equal Protection Clause itself, Croson, 488 U.S. at 510-11; they may impose unfair costs on those who are denied public goods on the basis of race, Wygant v. Jackson Bd. of Education, 476 U.S. 267, 276 (1986) (plurality opinion); and unless carefully limited they have no "logical stopping point" short of outright racial balancing, id. at 275. In contrast, race-conscious redistricting for the purpose of compliance with the Voting Rights Act furthers the Constitution's guarantee to "racial minorities [of] the right to full participation in the political life of the community," Washington v. Seattle School District No. 1, 458 U.S. 457, 467 (1982), and does so without denying to any individual the "enjoyment of the relevant opportunity -- meaningful participation in the

electoral process." Regents of Univ. of California v. Bakke, 438 U.S. 265, 305 (1978) (Powell, J.).<sup>47</sup>

The "opportunity" to be in the racial majority in one's congressional district is not, of course, a free-standing public good to which anyone is entitled under the Constitution, and finding oneself in the minority is not in itself an injury.48 The Voting Rights Act and the use of majority-minority districts that Act sanctions are "a rule hedging against racial discrimination," Thornburg v. Gingles, 478 U.S. 30, 83 (1986) (White, J., concurring), and they are limited, logically, geographically and temporally, by the existence of the very factors -- the demonstrable history of official discrimination, and the unfortunate continuance of racially polarized voting, in covered jurisdictions -- that brought them into existence. Because race-conscious redistricting in such circumstances does not present the concerns that animate the Croson line of cases, the opinions of this Court's members in the affirmative action cases consistently have treated such redistricting as outside the scope of the Croson analysis. See Metro Broadcasting v. FCC, 497 U.S. 547, , 110 S. Ct. 2997, 3019 (1990); Wygant, 476 U.S. at 291 (O'Connor, J., concurring in the judgment); Fullilove v. Klutznick, 448 U.S. 448, 524 n.3 (1980)

<sup>&</sup>lt;sup>47</sup> For reasons already discussed, the Plaintiffs' speculations that representatives elected under the Plan will not provide adequate representation for the Plaintiffs or other white voters are an unacceptable basis for constitutional adjudication.

The Plaintiffs' descriptions of the Plan as amounting to "the segregation of black from white voters," Pl.Br. at 31, and as creating a "racial quota," id. at 45, are simply incorrect. North Carolina's present congressional districts do not "segregate" voters by race any more than does any districting plan that creates, inadvertently or deliberately, districts in which there are local racial majorities and minorities — which is to say most legislative districts on every level in the United States. Nor does the Plan impose any sort of "quota" in terms of voters, candidates or elected representatives.

(Stewart, J., dissenting); Bakke, 438 U.S. at 305 (Powell, J.). Cf. City of Rome v. United States, 446 U.S. 156, 212 n.5 (1980) (Rehnquist, J., dissenting) (states are "empowered to utilize racial criteria in order to minimize the effects of racial-bloc voting"). 49

B. THE STATE REDISTRICTING PLAN IS JUSTIFIED BY THE COMPELLING GOVERNMENTAL INTEREST IN COMPLYING WITH THE VOTING RIGHTS ACT AND REMEDYING THE EFFECTS OF RACIAL DISCRIMINATION.

Even if the *Croson* line of decisions properly applied to race-based challenges to reapportionment plans, the North Carolina Plan should be deemed constitutional because it is "justified by [the] compelling governmental interest" of eliminating the effects of racial discrimination and racially polarized voting in electoral politics and is "narrowly tailored to the achievement of that goal." *Wygant*, 476 U.S. at 274 (omitting citations). 50

This Court repeatedly has recognized that states have a compelling interest in eradicating racial discrimination and its effects from public life. See, e.g., Croson, 488 U.S. at 491-93. Before employing a racial classification, however, a legislature seeking to pursue that goal must have "a strong basis in evidence for its conclusion that remedial action was necessary." Id. at 500. quoting Wygant, 476 U.S. at 277. The legislature, on the other hand, need not make quasi-judicial findings about the existence of racial discrimination: what is required is that "the public actor ha[ve] a firm basis for believing that remedial action is required," id. at 286 (O'Connor, J., concurring in the judgment) (summarizing the view held by the Court as a whole). In Croson itself, the Court held that the defendant's affirmative action program did not satisfy the compelling-interest strand of strict scrutiny. A comparison of the deficiencies the Court identified in that program with the reapportionment Plan challenged in this case demonstrates that the Plan meets the compelling-interest requirement.

In Croson, this Court ruled unconstitutional a municipal program requiring the city's non-minority-owned prime contractors to subcontract at least 30% of the dollar amount of their construction contracts to one or more "minority business enterprises." 488 U.S. at 477-78. Although the program theoretically permitted contractors actually unable to fulfill its requirements to request a waiver, the stated standards for granting a waiver were stringent and the city administrator's discretion to deny a waiver was

<sup>&</sup>lt;sup>49</sup> Many commentators agree that the constitutional issues presented by raceconscious redistricting are fundamentally different from those that exist in the
affirmative action context. See, e.g., D. Currie, The Constitution in the Supreme
Court: The Second Century 485 n.150 (1990); O'Rourke, The 1982 Amendments
and the Voting Rights Paradox, in B. Grofman & C. Davidson, Controversies in
Minority Voting 107-08 (1992); Issacharoff, Polarized Voting and the Political
Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L. Rev.
1833, 1865 (1992) (protection of minority voting strength is directed toward
correction of the political process and is thereby different from "purely outcomedriven civil rights claims against the distribution of goods and opportunities in
this society"); Posner, The Bakke Case and the Future of "Affirmative Action,"
67 Calif. L. Rev. 171, 178 n.21 (1979) (distinguishing race-conscious redistricting in U.J.O. as "a special case" not addressed by the Court's general affirmative
action jurisprudence).

Secause race-conscious redistricting is required in order to comply with §§ 2 and 5 of the Voting Rights Act, supra, at 27-34, if the affirmative action decisions actually applied in this situation, the proper standard of evaluation would be intermediate level scrutiny, not strict scrutiny. See Metro Broadcasting (continued...)

<sup>50(...</sup>continued)

v. FCC, 110 S. Ct. at 3008-09 (intermediate level scrutiny to be used to evaluate affirmative action programs "approved -- indeed, mandated -- by Congress"). See also id. at 3030 (O'Connor, J., dissenting) (Congress "has considerable latitude, presenting special concerns for judicial review [when it] act[s] respecting the States" pursuant to § 5 of the Fourteenth Amendment). Because the State's Plan meets the more exacting standards of strict scrutiny, it necessarily satisfies the Metro Broadcasting test.

essentially plenary. *Id.* at 478-79. The program in effect imposed "a rigid numerical quota" reserving access to certain public-contract monies to racial minorities, thus denying them to non-minority contractors. *Id.* at 508.

Richmond's asserted compelling interest was the need to combat racial discrimination in the local construction industry. However, as the Court pointed out, the city based this need on "a generalized assertion" about "past discrimination in an entire industry," id. at 498; "sheer speculation" about the effects of past discrimination on present minority participation in the industry, id. at 499; and "the unsupported assumption that white prime contractors simply will not hire minority firms." Id. at 502. "There [was] nothing approaching a prima facie case of a constitutional or statutory violation" by the city itself in its administration of public contracts. Id. at 500. Congress's finding that there has been racial discrimination on a nationwide basis in the highway construction industry did not provide Richmond with the necessary "evidence that [its] own spending practices are exacerbating a pattern of prior discrimination" in the local general contracting market. Id. at 504. Because the city could point to no "identified discrimination in the Richmond construction industry," it could not invoke the need to eliminate such discrimination in support of a racial preference program. Id. at 505.

North Carolina, unhappily, has "sufficient evidence to justify the conclusion that there has been prior discrimination," Wygant, 476 U.S. at 277, in the State's political processes. The imposition of the preclearance requirement of § 5 of the Voting Rights Act is predicated on "extensive Congressional findings of voting discrimination in the covered jurisdictions," Sen.Rep. 97-417 at 192, and Congress's extension of the Voting Rights Act in 1982 reflects its considered judgment that such official discrimina-

tion and its effects remain a severe problem in jurisdictions that fall under the criteria for coverage. *Id.* at 191. *See McCain v. Lybrand*, 465 U.S. 236, 244-45 (1984). The fact that forty North Carolina counties are covered under § 5 and that they are so located as to require all statewide redistricting plans to be submitted for preclearance provided the legislature with a factual basis for strong measures to combat the effects of discrimination in the political process. The Attorney General's refusal to preclear the State's first reapportionment plan bolsters that conclusion. *See Bakke*, 438 U.S. at 305 (Powell, J.) (§ 5 objection "properly is viewed" as "an administrative finding of discrimination").

This Court's decision in *Gingles* provided an independent basis on which the legislature could conclude that it has in fact a compelling interest in eliminating the effects of racial discrimination in the State's political processes. In *Gingles*, this Court affirmed extensive findings by a three-judge district court that there has been a lengthy past history of official racial discrimination in North Carolina's political system and in the State's policies generally and that the present effects of that history have a significant effect on the ability of African-Americans to participate equally in the State's political life. *Gingles v. Edmisten*, 590 F. Supp. 345, 359-67 (E.D.N.C. 1984). The district court also found that "within all the challenged [state legislative] districts racially polarized voting exists in a persistent and severe degree." *Id.* at 367. *See* 478 U.S. at 80 (approving district court's findings).<sup>51</sup>

The Plaintiffs' statement that "[n]o court or agency has determined that racial discrimination has ever occurred in the creation of congressional districts in North Carolina," Pl.Br. at 19, is factually inaccurate and legally inapposite. It is legally unnecessary to show that each particular aspect of an electoral system has had a discriminatory purpose and effect where, as in North Carolina, there is a history of discrimination "affect[ing] the exercise of the right to vote in all elections," Jeffers v. Clinton, 730 F. Supp. 196, 204 (E.D. Ark. 1989), aff'd (continued...)

The legislature thus had ample reason to believe that racially polarized voting in North Carolina elections perpetuates the effects of past official discrimination and implicates the State through its electoral system in the operation of private prejudice. *See Croson*, 488 U.S. at 492-93.

The state Defendants submit that the implications of § 5 coverage and the findings in Gingles provide more than sufficient reason for the legislature to conclude that it had a "firm basis" on which to conclude that there has been past discrimination in the State's political processes and that the present effects of that discrimination warrant race-conscious measures. See Wygant, 476 U.S. at 286 (O'Connor, J., concurring in judgment). In addition, and most simply, the State clearly has a compelling interest in complying with the Voting Rights Act, an interest that is of course closely related to its interest in combatting discrimination. "[T]he State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." Croson, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment). Accord, id. at 491-93, 509-10 (O'Connor, J.). It is evident on the face of the Plaintiffs' complaint that the Plan is justified by a compelling governmental interest.

C. THE STATE'S REDISTRICTING PLAN IS NARROWLY TAILORED TO THE STATE'S GOAL OF COMPLYING WITH THE VOTING RIGHTS ACT AND REMEDYING THE EFFECTS OF RACIAL DISCRIMINATION.

Governmental programs subject to heightened scrutiny must also be appropriately tailored to the accomplishment of the goal the legislature is attempting to pursue. The Court's decisions reveal two major concerns in its review of the fit between means and end under this test. The Court questions, first, whether the program's use of race is overly broad or unnecessarily rigid. See Wygant, 476 U.S. at 276. In Croson, for example, this Court examined the city program's use of a rigid 30% quota and concluded that the choice of the figure was unrelated "to any goal, except perhaps outright racial balancing." 488 U.S. at 507. The Court also noted that the rigidity of the program, which made "the color of applicant's skin the sole relevant consideration," was unjustified given the existence of "an individualized procedure" for considering bids and waivers. Id. at 508.52 "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination." Id.

The legislature's creation of majority-minority districts, in contrast, is related precisely and directly to its goals. Faced with the existence of racially polarized voting, and with the Attorney

<sup>51(...</sup>continued)

mem., 111 S. Ct. 662 (1981). In any event, the district court in Gingles explicitly made findings about racial discrimination affecting the State's congressional elections. See 590 F. Supp. at 359-60, 364-65. The Plaintiffs, it should be noted, invoke African-American electoral success in non-congressional elections in their attempt to deny the continued existence of the effects of racial discrimination in the State's politics. Pl.Br. at 43, 59. In contrast, no African-American member of Congress was elected in North Carolina in this century until the 1992 election.

The Court's opinion observed that the city did not consider "the use of race-neutral means to increase minority business participation in city contracting." 488 U.S. at 507. In the context of a reapportionment plan subject to preclearance under § 5 of the Voting Rights Act, there were no "race-neutral" measures the legislature realistically could consider.

General's refusal to preclear a reapportionment plan containing only one majority-minority district, the legislature crafted a plan with two such districts, the number, location and shape of which were dictated by the number and residences of African-American North Carolinians. As many commentators have observed, majority-minority redistricting is the only effective means of overcoming the effects of racially polarized voting. See, e.g., B. Grofman, L. Handley, and Richard G. Niemi, Minority Representation and the Quest for Voting Equality 129-37 (1992); A. Thernstrom, Whose Votes Count? 238-39 (1987). The creation of majority-minority districts, furthermore, is a self-limiting remedy. If the racially polarized voting the effects of which the legislature is addressing diminish or disappear, then the "injury" Plaintiffs allege (their inability to elect candidates of their choice because of race) necessarily will disappear as well. 54

The requirement of narrow tailoring also serves to minimize the harm that affirmative action programs impose on non-minority third parties who are denied public goods on the basis of race. *Croson*, 488 U.S. at 510; *id.* at 515-16 (Stevens, J., concurring in part); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring) (impact on third

parties is a factor "of primary importance"). See also Metro Broadcasting, 110 S. Ct. at 3026 (under intermediate level scrutiny, Court will find the required "substantial relationship" to an important governmental interest only if the program "does not impose undue burdens on nonminorities"). Opinions applying the narrow-tailoring requirement consequently have looked to the severity of the harm done third parties, Wygant, 476 U.S. at 280-84 (Powell, J.); id. at 294-95 (White, J., concurring in the judgment); id. at 318-19 (Stevens, J., dissenting), and to the degree to which their "settled expectations" are infringed or denied. Id. at 283 (Powell, J.).

The State's reapportionment Plan is narrowly tailored so as to avoid unnecessary harm to nonminority voters. The Plan imposes no racial quota and places no obstacle in the way of Plaintiffs' full participation in the political process. Bakke, 438 U.S. at 305 (Powell, J.). The Plaintiffs remain completely free to express their political views, to support candidates of their choice, and to seek public office. The fact that as a consequence of the Plan two of the Plaintiffs find themselves in the racial minority in their congressional district is no more a cognizable injury than is the fact that non-white voters are in the minority in ten of the State's congressional districts. The Plaintiffs have suffered no constitutional injury, and their speculations about the future course of congressional elections or the possible inadequacy of their representation in the future provide no basis on which to conclude that their legitimate expectations have been overturned. See Thernstrom at 242 (white voters whose candidates "could win . . . in a differently constituted district" are not even arguably denied "a right" by majority-minority redistricting).

The Plaintiffs have offered no alternative means by which the General Assembly could have pursued effectively its compel-

<sup>&</sup>lt;sup>53</sup> Profess or Thernstrom, who is a distinguished and vigorous critic of raceconscious redistricting in most circumstances, has observed that "[t]here is no
doubt that where 'racial politics . . . dominates the electoral process' and public
office is largely reserved for whites, the method of voting should be restructured
to promote minority officeholding. Safe black or Hispanic single-member
districts hold white racism in check, limiting its influence." Thernstrom at 23839. Where such conditions exist, majority-minority redistricting is a precise
response to the problem. Cf. Croson, 488 U.S. at 519 (Kennedy, J., concurring
in part) (strict scrutiny requires examination of "the precision with which [the
affirmative action program] bore on whatever injury in fact was addressed").

<sup>&</sup>lt;sup>54</sup> The reapportionment Plan under review in this case is, of course, limited in an even simpler fashion by the fact that it will be in effect only for a decade.

ling interest in complying with the Voting Rights Act and combatting the effects of racial discrimination in the State's political processes. In light of the close fit between that goal and the State's creation of two majority-minority districts, it is clear on the face of the complaint that the Plaintiffs cannot carry the burden of demonstrating that the State's Plan is not adequately tailored to serve the State's compelling interests.

#### CONCLUSION

The Court should affirm the judgment entered in the cause by the three-judge United States District Court for the Eastern District of North Carolina.

Respectfully submitted,

MICHAEL F. EASLEY North Carolina Attorney General

H. Jefferson Powell\*
Special Counsel to the Attorney General

Edwin M. Speas, Jr. Senior Deputy Attorney General

Norma S. Harrell Special Deputy Attorney General

Tiare B. Smiley Special Deputy Attorney General

North Carolina Department of Justice Post Office Box 629 Raleigh, North Carolina 27602-0629 (919) 733-3786 APPENDIX

# BEST AVAILABLE COPY

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#### 1a

#### AMENDMENT XIV.

- § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
- § 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

#### AMENDMENT XV.

- § 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.
- § 2. The congress shall have power to enforce this article by appropriate legislation.

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42 USC § 1973

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
- (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 USC § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

5a

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972. such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with

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such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

#### 28 CFR Part 51

### § 51.51 Purpose of this subpart.

The purpose of this subpart is to inform submitting authorities and other interested parties of the factors that the Attorney General considers relevant and of the standards by which the Attorney General will be guided in making substantive determinations under Section 5 and in defending Section 5 declaratory judgment actions.

#### § 51.52 Basic standard.

(a) Surrogate for the court. Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under Section 5: Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. See South Carolina v. Katzenbach, 383 U.S. 301, 328, 335 (1966).

(b) No objection. If the Attorney General determines that the submitted change does not have the prohibited purpose or effect, no objection shall be interposed to the change.

(c) Objection. An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect. This includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.

#### § 51.54 Discriminatory effect.

(a) Retrogression. A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See Beer v. United States, 425 U.S. 130, 140-42 (1976).

# § 51.55 Consistency with constitutional and statutory requirements.

- (a) Consideration in general. In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), Sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.
- (b) Section 2. (1) Preclearance under Section 5 of a voting change will not preclude any legal action under Section 2 by the Attorney General if implementation of the change subsequently demonstrates that such action is appropriate. (2) In those instances

in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance.

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11a

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20085

Tiare B. Smiley, Esq.
Special Deputy Attorney General
P.O. Box 629
Raleigh, North Carolina 27602-0629

Dear Ms. Smiley:

This refers to Chapter 675 (1991), which provides for the 1991 redistricting and a change in the method of election from 42 single-member districts and 30 multimember districts to 75 singlemember districts and 20 multimember districts for the House of Representatives; Chapter 676 (1991), which provides for the 1991 redistricting plan and a change in the method of election from 22 single-member districts and 28 multimember districts to 34 singlemember districts and 8 multimember districts for the Senate; and Chapter 601 and Chapter 761 (1991), which provide for the increase from eleven to twelve congressional districts and the 1991 redistricting plan for the congressional districts for the State of North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our request for more information on November 5, 1991; supplemental information was received on November 18, 20, 21, 25, 26 and 27, and December 4, 10, 12 and 13, 1991.

We have carefully considered the information you have provided, as well as Census data and information and comments

from other interested persons. At the outset, we note that 40 of North Carolina's 100 counties are covered under the special provisions of Section 5 of the Voting Rights Act. As it applies to the redistricting process, the Voting Rights Act requires the Attorney General to determine whether the submitting authority has sustained its burden of showing that each of the legislative choices made under a proposed plan is free of racially discriminatory purpose or retrogressive effect and that the submitted plan will not result in a clear violation of Section 2 of the Act. In the case of statewide redistricting such as the instant ones, this examination requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in arriving at a particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52(a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities, see, e.g., Garza v. Los Angeles County, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1408-09 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985), or where the proposed plan, given the demographics and racial concentrations in the jurisdiction, does not fairly reflect minority voting strength. Thornburg v. Gingles, 478 U.S. 30 (1986); Hastert v. State Board of Elections, F. Supp. (N.D. III., Nov. 6, 1991), 1991 WL 228185; Wilkes County, Georgia v. United States, 450 F. Supp. 1171, 1176 (D.D.C. 1978), aff'd. mem., 439 U.S. 999 (1978).

Such concerns are frequently related to the unnecessary fragmentation of minority communities or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular jurisdiction's need to redistrict and the options available to the legislature. Finally, our entire review is guided by the principle that the Act ensures fair election opportunities and does not require that any jurisdiction guarantee minority voters racial or ethnic proportional results.

With this background in mind, our analysis shows that, in large part, the North Carolina House, Senate and Congressional redistricting plans meet the Section 5 preclearance requirements. Each plan, however, has particular problems which raise various concerns for us under the Voting Rights Act. We describe each of these problem areas separately below.

Respecting the House plan, the proposed configuration of district boundary lines in the following three areas of the state appear to minimize black voting strength: the Southeast area, involving Sampson, Pender, Bladen, Duplin, New Hanover, Wayne, Lenoir and Jones Counties; the Northeast area in which the state proposes to create District 8; and Guilford County.

In general, it appears that in each of these areas the state does not propose to give effect to overall black voting strength, even though it seems that boundary lines logically could be drawn to recognize black population concentrations in each area in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect candidates of their choice. Another factor which appears to adversely impact on minority voting strength, by limiting the

number of majority minority districts, was the state's decision to manipulate black concentrations in a way calculated to protect white incumbents.

In the Southeast area of the state, the state was aware of the significant interest on the part of the black community in creating districts in which they would constitute a majority. In fact, alternatives providing for two additional black majority districts were presented to the legislature. Rather than using this approach to recognize black voting strength, however, the proposed plan submerges concentrations of black voters in several multimember, white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

In the Northeastern portion of the state, District 8 seems to have been drawn in such a way as to limit unnecessarily the potential for black voters to elect representatives of their choice. In spite of the 58 percent black population majority, serious concerns have been raised as to whether black voters in this district will have an equal opportunity to elect their preferred candidate, particularly given the fact that only 52 percent of the registered voters in the district are black. Our analysis indicates that a number of different options are available to draw District 8 in a manner which provides blacks an equal opportunity to participate in the electoral process (e.g., including in District 8 black concentrations in adjoining districts).

Similarly, in Guilford County, the proposed plan fails to recognize black population concentrations, although reasonable configurations of boundary lines would permit an additional district that would provide black voters the opportunity to elect their

candidates of choice. While we have noted the state's assertion that the division of the black community in Guilford County into several districts enhances black voting strength by providing black voters an opportunity to influence elections in additional districts, it appears that the plan in fact was designed to ensure the reelection of white incumbents. This conclusion is bolstered by what appears to be similarly motivated decisions of the legislature involving other areas of the state, such as in Mecklenburg County. There, the state drew two minority House districts, while the minority population appears to be sufficiently concentrated to allow for the drawing of three districts in which black voters would have an opportunity to elect candidates of their choice. While we are aware that Mecklenburg is not a county subject to the preclearance requirements of Section 5, information regarding the choices of boundary line changes in the county is relevant to our review of the concern that purposeful choices were made throughout the redistricting processes that adversely impact minority voting strength.

Respecting the Senate redistricting plan, the state has proposed district boundary lines in the southeast region of the state that appear to minimize black voting strength, given the particular demography of this area. Although boundary lines logically could be drawn to recognize black population concentrations in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect a candidate of their choice, the proposed districts seem to be the result of the state's decision to use concentrations of black voters in white majority districts to protect white incumbents. Black citizens from this area testified that they felt a black majority single-member district could be fairly drawn, and alternatives providing for a black majority district were presented to the legislature. It appears, however, that concentrations of black

voters have been submerged in several white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

Respecting the congressional redistricting plan, we note that North Carolina has gained one additional congressional seat because of an increase in the state's population. The proposed congressional plan contains one majority black congressional district drawn in the northeast region of the state. The unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and, indeed, at least one alternative configuration was available that would have been more compact. Nonetheless, we have concluded that the irregular configuration of that district did not have the purpose or effect of minimizing minority voting strength in that region.

As in the House and Senate plans, however, the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state. Jeffers v. Clinton, 730 F.Supp. 196, 207 (E.D. Ark. 1989), affirmed, 111 S. Ct. 662 (1991).

We also note that the state was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina.

For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature. No alternative plan providing for a second majority-minority congressional district-was presented by the state to the public for comment. Nonetheless, significant support for such an alternative has been expressed by the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU). These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons. Indeed, some commenters have alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength. Such submergence will have the expected result of "minimiz[ing] or cancel[ling] out the voting strength of [black and Native American minority voters]." Fortson v. Dorsey, 379 U.S. 433, 439 (1965). Although invited to do so, the state has yet to provide convincing evidence to the contrary.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance with respect to the three proposed plans under review. Therefore, on behalf of the Attorney General, I must object to the 1991 redistricting for the North Carolina State House, Senate and Congressional plans to the extent that each incorporates the proposed configurations for the areas discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1991 House, Senate and Congressional redistricting plans have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the 1991 redistrictings for the North Carolina House, Senate and Congressional plans continue to be legally unenforceable. Clark v. Roemer, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of North Carolina plans to take concerning these matters. If you have any questions, you should call Richard Jerome (202-514-8696), an attorney in the Voting Section.

Sincerely,

John R. Dunne Assistant Attorney General Civil Rights Division

ANALYSIS OF NORTH CAROLINA CONGRESSIONAL DISTRICTS BY TOTAL POPULATION

District 1         1         552,386         552,386         0         0.00%           District 2         1         552,387         552,386         1         0.00%           District 4         1         552,387         552,386         1         0.00%           District 5         1         552,386         1         0.00%           District 6         1         552,386         0         0.00%           District 6         1         552,386         0         0.00%           District 8         1         552,386         0         0.00%           District 9         1         552,386         1         0.00%           District 10         1         552,386         552,386         0         0.00%           District 11         1         552,386         552,386         0         0.00%           District 12         1         552,386         552,386         0         0.00%           District 12         1         552,386         0         0.00%           Total         12         6,628,637         0         0.00%           Total         12         6,628,637         0         0.00%	District Name	Number	Total Population	Total Population Ideal Population	District	% District Variance
1       552,386       552,386       0         1       552,387       552,386       1         1       552,386       552,386       1         1       552,386       552,386       0         1       552,386       552,386       0         1       552,387       552,386       1         1       552,387       552,386       1         1       552,387       552,386       1         1       552,387       552,386       1         1       552,386       552,386       1         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         2       552,386       0       0         3       552,386       0       0         4       552,386       552,386       0         5       552,386       0	District 1	1	552,386	552,386	0	0.00%
1       552,387       552,386       1         1       552,387       552,386       1         1       552,386       552,386       0         1       552,386       552,386       0         1       552,387       552,386       1         1       552,387       552,386       1         1       552,387       552,386       1         1       552,387       552,386       1         1       552,387       552,386       1         1       552,387       552,386       1         1       552,386       552,386       1         1       552,387       552,386       0         1       552,387       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       6,628,637       6,628,632       0	District 2		552,386	552,386	0	0.00%
1       552,387       552,386       1         1       552,386       552,386       0         1       552,386       552,386       0         1       552,387       552,386       1         1       552,387       552,386       1         1       552,387       552,386       1         1       552,386       552,386       1         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,387       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       0       0         1       6,628,637       6,628,632       0	District 3	-	552,387	552,386	-	0.00%
1       552,386       552,386       0         1       552,386       552,386       0         1       552,386       552,386       0         1       552,387       552,386       1         1       552,387       552,386       1         1       552,386       552,386       0         1       552,386       1         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0	District 4	-	552,387	552,386	-	0.00%
1       552,386       552,386       0         1       552,386       0         1       552,387       552,386       1         1       552,387       552,386       1         1       552,386       1         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0	District 5	-	552,386	552,386	0	0.00%
1       552,386       552,386       0         1       552,387       552,386       1         1       552,387       552,386       1         1       552,386       552,386       0         1       552,387       552,386       0         1       552,387       552,386       0         1       552,386       0         1       552,386       0         1       552,386       0	District 6	-	552,386	552,386	0	0.00%
1       552,387       552,386       1         1       552,387       552,386       1         1       552,386       552,386       0         1       552,387       552,386       1         1       552,386       552,386       0         1       552,386       552,386       0         12       6,628,637       6,628,632       0	District 7	-	552,386	552,386	0	0.00%
1       552,387       552,386       1         1       552,386       552,386       0         1       552,387       552,386       1         1       552,386       552,386       0         12       6,628,637       6,628,632       0	District 8	1	552,387	552,386	_	0.00%
1     552,386     552,386     0       1     552,387     552,386     1       1     552,386     1       1     552,386     0       12     6,628,637     6,628,632     0	District 9	-	552,387	552,386	-	0.00%
t 11 1 552,387 552,386 1 1 552,386 1 1 552,386 0 0 1 12 6,628,637 6,628,632 0	District 10	-	552,386	552,386	0	0.00%
t 12 1 552,386 552,386 0 12 6,628,637 6,628,632 0	District 11	-	552,387	552,386	-	0.00%
12 6,628,637 6,628,632 0	District 12	-	552,386	552,386	0	0.00%
	Total	12	6,628,637	6,628,632	0	0.00%

Source: 1990 Census of Population and Housing P.L. 94-171

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Analysis of North Carolina Congressional Districts for Total Population by Race

District	Total	Total	Total	Total	Total	Total
Name	Pop.	White	Black	Am. Ind.	Asian/PI	Other
District 1	552,386	229,829	316,290	3,424	1,146	1,698
	100.00%	41.61%	57.26%	0.62%	0.21%	0.31%
District 2	552,386	421,083	121,212	3,154	4,077	2,860
	100.00%	76.23%	21.94%	0.57%	0.74%	0.52%
District 3	552,387	423,398	118,640	2,436	4,044	3,869
	100.00%	76.65%	21.48%	0.44%	0.73%	0.70%
District 4	552,387	426,361	111,168	1,548	10,602	2,714
	100.00%	77.19%	20.13%	0.28%	1.92%	0.49%
District 5	552,386	463,183	83,824	1,083	2,448	1,848
	100.00%	83.85%	15.17%	0.20%	0.44%	0.33%
District 6	552,386	504,465	41,329	1,973	3,489	1,129
	100.00%	91.32%	7.48%	0.36%	0.63%	0.20%
						(continued)

District 7		0			0	
	552,386	394,855	103,428	40,166	5,835	8,102
	100.00%	71.48%	18.72%	7.27%	1.06%	1.47%
District 8	552,387	402,406	128,417	13,789	4,232	3,543
	100.00%	72.85%	23.25%	2.50%	0.77%	0.64%
District 9	552,387	492,424	49,308	1,729	7,373	1,553
	100.00%	89.14%	8.93%	0.31%	1.33%	0.28%
District 10	552,386	517,542	30,155	942	2,238	1,510
	100.00%	93.69%	5.46%	0.17%	0.41%	0.27%
District 11	552,387	502,058	39,767	7,835	1,791	936
	100.00%	868.06	7.20%	1.42%	0.32%	0.17%
District 12	552,386	230,888	312,791	2,077	4,891	1,739
	100.00%	41.80%	56.63%	0.38%	0.89%	0.31%
Total 6	6,628,637	5,008,492	1,456,329	80,156	52,166	31,501
	100.00%	75.56%	21.97%	1.21%	0.79%	0.48%

Source: 1990 Census of Population and Housing P.L. 94-171

ulation by Ra Analysis of North Carolina Congressional Districts for Votin

District	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/PI	Total
District 1	399,969	181,933	213,602	2,428	844	1,110
District 2	420,087	328,676	84,311	2,173	3,074	1,963
District 3	413,263	324,808 78.60%	81,170	1,755	2,922	2,608
District 4	428,984	336,850	81,210	1,239	7,782	1,903
District 5	428,782	364,886	60,204	822	1,650	1,221
District 6	428,096	393,271	30,188	1,433	2,407	798 0.19% (continued)

District 7	414,413	306,754	71,071	26,489	4,201	5,898
	100.00%	74.02%	17.15%	6.39%	1.01%	1.42%
District 8	403,678	305,366	84,386	8,699	2,956	2,271
	100.00%	75.65%	20.90%	2.15%	0.73%	0.56%
District 9	421,615	380,364	33,849	1,275	5,059	1,069
	100.00%	90.22%	8.03%	0.30%	1.20%	0.25%
District 10	421,456	397,476	20,837	700	1,409	1,036
	100.00%	94.31%	4.94%	0.17%	0.33%	0.25%
District 11	430,457	396,064	27,438	5,126	1,237	592
	100.00%	92.01%	6.37%	1.19%	0.29%	0.14%
District 12	411,687	186,115	219,610	1,529	3,283	1,150
	100.00%	45.21%	53.34%	0.37%	0.80%	0.28%
Total	5,022,487	3,902,563	1,007,876	53,668	36,824	21,619
	100.00%	77.70%	20.07%	1.07%	0.73%	0.43%

Source: 1990 Census of Population and Housing P.L. 94-171

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Appellants,

v.

JANET RENO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF NORTH CAROLINA, RALEIGH DIVISION

APPELLANTS' REPLY BRIEF

ROBINSON O. EVERETT\*

JEFFREY B. PARSONS

EVERETT, GASKINS, HANCOCK

& STEVENS

Suite 300 FUNB Bldg.

301 West Main Street

Durham, N. C. 27702

(919) 682-5691

Counsel for Petitioners

\*Counsel of Record

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#### IN THE

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V.

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Appellees.

ON APPEAL FROM THE UNITED STATES
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APPELLANTS' REPLY BRIEF

#### ARGUMENT

## Summary of Argument

The "color-blind Constitution" is not an "impossible dream" but a legally binding charter of government. Therefore, North Carolina's purposeful use of racial quotas

in Congressional redistricting is unconstitutional state action, for which the Voting Rights Act provides no defense. This Court's recent reapportionment opinions have made even clearer than before that Appellees -- acting with an invidious discriminatory intent -- injured Appellants' important constitutional rights as registered voters.

I. NORTH CAROLINA'S PURPOSEFUL USE OF RACIAL QUOTAS IN REDISTRICTING VIOLATED THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

The Complaint, as amended, alleged that two racial quotas were used by the North Carolina General Assembly at the insistence of Attorney General Barr. One quota was for members of Congress -- that two of the twelve members of Congress from North Carolina would be black. See

Complaint ¶¶ 16, 23, 27, 28, 36 and 36(A). To assure filling this quota was the reason for the second quota -- that in each of two of the twelve congressional districts there must be a majority of black voters. See Complaint §§ 17, 23, 27, 28, 26 and 36(A).

The Appellees and their Amici contend that, in attacking these racial quotas, Appellants are seeking to "change" the Constitution and rewrite the Fourteenth and Fifteenth Amendments. However, Appellants in their Brief on the Merits have already pointed out that the "group rights" approach of the Appellees is contrary to the "personal rights" rationale of Reynolds v. Sims, 377 U.S. 533 (1964) and its offspring.<sup>2</sup>

U.S.L.W. 4163 (February 23, 1993); Voinovich v. Quilter, U.S. , 61 U.S.L.W. 4199 (March 2, 1993).

<sup>&</sup>lt;sup>2</sup> <u>See</u> Appellants' Brief on the Merits at pp.22-29. Likewise, this approach is inconsistent with the text of the Fourteenth and Fifteenth Amendments which refer, respectively, to "persons" and "citizens", rather than to "groups" or

Furthermore, the "color-blind Constitution", to which Justice Harlan referred in Plessy v. Ferguson, 163 U.S. 537, 559 (1896), finds substantial support in later precedents of this Court. In Buchanan v. Warley, 245 U.S. 60, 76 (1917), which invalidated a Louisville ordinance requiring separate city blocks for whites and blacks, the Court announced:

While a principal purpose of the [Fourteenth Amendment] was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminating legislation by the states.

U.S. 81 (1943), the Court allowed the use of a racial classification because of a national emergency; but its unanimous opinion stated: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality". A few years later the NAACP Legal Defense Fund filed in

<sup>&</sup>quot;minorities". Thus, in Richmond v. J.A. Croson, Inc., 488 U.S. 469, 493 (1989), Justice O'Connor observed that "Rights created by the Fourteenth Amendment are by its terms guaranteed to the individual. The rights established are personal rights. Shelley v. Kraemer, 334 U.S. 1, 22 (1948)".

<sup>3</sup> As Justice O'Connor has pointed out, "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color". See,

Croson, supra, n.2 at 494 (quoting opinion of Justice Powell in Regents of the University of California v. Bakke, 438 U.S. 265, 289-290 (1978)). In a parallel context the Court reasoned that the fact that a Mississippi "statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review". Mississippi University for Women v. Hogan, 458 U.S. 718, 723 (1982).

<sup>&</sup>lt;sup>4</sup> Even the Court's limited approval of an ethnic classification in <u>Hirabayashi</u> and then in <u>Korematsu v. United States</u>, 323 U.S. 214 (1944), has subsequently been the subject of extensive criticism. <u>See</u> P. Irons, <u>Justice at War</u> (1983).

this Court a brief signed by Thurgood Marshall as principal author, which stated:5

Classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws, and this Court has struck down statutes, ordinances or official policies seeking to establish such classifications.

The concept of a "color-blind Constitution" is implicit in many decisions rendered by this Court since Brown v. Board of Education, 347 U.S. 483 (1954).6 Recently, Batson and its progeny have strongly disapproved race-based peremptory

challenges in jury trials.7

The argument of Appellees and their Amici that purposeful racial discrimination may sometimes be justified constitutionally as "benign" was recently answered by Justice Scalia in these words:

"benign" purpose compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. See, e.g., Wygant v. Jackson Board of Education, 476 U.S. 267, 274-276 (1986)(plurality opinion) (discrimination teacher in assignment to provide "role models" for minority students); Palmore v. Sidoti, 466 U.S. 429, 434 (1984)

of Regents of the Univ. of Okla. (No. 369 (Oct. Term 1947) at 27). See also, A. Kull, The Color-Blind Constitution, (1992) at 146.

<sup>&</sup>lt;sup>6</sup> Appellants' Brief on the Merits at pp. 29-31.

Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 499 U.S. , 111 S.Ct. 1364 (1991); Georgia v. McCollum, 505 U.S. , 111 S.Ct. 2348 (1992); Edmonson v. Leesville Concrete Co., U.S. , 111 S.Ct. 41 (1991); Hernandez v. New York, U.S. , 111 S.Ct. 1859 (1991). Since the right to a jury trial is second in importance only to the right to vote, these decisions requiring race-neutral peremptory challenges are especially important.

(awarding custody of child to father after divorced mother entered interracial remarriage in order to spare child social "pressures and stresses"); Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (permanent racial segregation of prisoners presumably to avoid racial conflict).

\* \* \* \*

Alexander Bickel that "[T]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society", A. Bickel, The Morality of Consent, 133 (1975).

Appellees' contention that To "change" the seek to Appellants Constitution, they reply that our "living Constitution" is not so inflexible as Appellees suggest and, therefore, it can "lesson take into account the

contemporary history" that the purposeful use of racial classifications in defining the rights of citizens is "immoral" and "unconstitutional". To Appellants' argument that "race-neutral" congressional

<sup>&</sup>lt;sup>8</sup> Croson, supra, n.2 at 520 (Scalia, J., concurring in judgment).

<sup>9</sup> On various occasions this Court has made clear that the Constitution takes changing conditions into account. Thus, in wartime, the constitution "marches" and "fights". See, Lichter v. United States, 334 U.S. 742, 781-1 (1948). The Eighth Amendment's prohibition of "cruel and unusual punishment" is applied in light of "evolving standards of decency that mark the progress of a maturing society". Trop v. Dulles, 356 U.S. 86, 101 (1958). In ruling that zoning was not inconsistent with the Fourteenth Amendment quarantee of substantive due process, the Court remarked in Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926), "while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise". Appellants submit that, in light of contemporary experience with the destructive effects of racism, the Fourteenth and Fifteenth Amendments do not permit in the 1990's the race-based redistricting that characterizes the North Carolina plan.

redistricting is not feasible, Appellants have a dual reply.

First, Appellees and their Amici have exaggerated the difficulties in race-neutral redistricting. The race-neutral standards invoked by Appellants are workable and have been used on occasion by the Congress and by this Court itself. 10

When Appellees insist that race-conscious redistricting is inevitable and, if not done openly, will be accomplished by "proxy", they impugn the good faith of legislators and underestimate the ability of the courts to detect and remedy violations. 11

Second, whatever its problems, raceneutral redistricting is preferable to
Appellees' alternative of majority-minority
districts. The racial quotas -- which
Appellees seek to defend as "benign

<sup>10</sup> For example, the Apaportionment Act of 1911, 37 Stat. 13, (1911) provided that districts should Congressional "contiguous and compact"and have as nearly practicable the same number of inhabitants. Although these requirements were omitted from the Apportionment Act of 1929, 46 Stat. 21 (1929), see Wood v. Broom, 287 U.S. 1 (1932), there is no indication that they were unworkable or impossible to understand. In United Jewish Organizations v. Carey, 430 U.S. 144, 168 (1977) (hereafter UJO), the plurality opinion referred to "sound districting principles such as compactness and population equality". The "compactness" of a minority group is a precondition under Thornburg v. Gingles, 478 U.S. 30, 50 (1986) for dividing a multimember district; and Growe v. Emison, supra n.l, imposes a similar condition for a single-member The Court's reference in district. Reynolds v. Sims, supra at 568, to apportionment "completely lacking in

rationality", carries the implication that rational principles are available for use in reapportionment and redistricting. Appellants submit that these principles must be used to draft a constitutional redistricting plan in North Carolina with no resort to racial quotas.

In North Carolina, where -- as in many other states -- meetings of the legislature and its committees are open to the public and well-covered by the press, the concealment of purposeful racial discrimination in redistricting is made more difficult.

discrimination" -- "only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth", see, Croson, supra, n.2 at 494 (quoting Powell, J.)<sup>12</sup> Thereby, a "stigma" is imposed "on the supposed beneficiaries". Id. at 516.

One Amicus brief reveals its unconscious reliance on "stereotypes" when it insists that the Twelfth Congressional District complies with "rational

redistricting principles", because "despite its odd shape, [it] is still compact -- the district recognizes a community of interest, mainly urban African-Americans with similar concerns and interests, is easily traversed and has less land area than any other North Carolina congressional A mere glance at this district." 13 "serpentine" district makes obvious that its only "community of interest" is created by race and that the "stereotype" in the minds of its creators was that any black in one end of the district would have a greater affinity with any black in another part than with a next-door neighbor of a different race.

Racial quotas "cause the same

When, on December 18, 1991, Assistant Attorney General Dunne denied preclearance for North Carolina's reapportionment and redistricting plan, he stated that there were other boundary line configurations which would "more fairly recognize black population concentrations and provide minority voters an opportunity to select candidates of their choice ... " (see, State Appellees' Brief at p.14a). (Emphasis supplied) The Court undoubtedly realizes that, as employed in Dunne's letter, the term "candidate of their choice" was a euphemism for "African-American candidate".

National Committee, et al at p.23. Appellants have lodged with the Court various maps which show the boundaries of the Twelfth Congressional District and other districts.

corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well". Id. at 510 (Kennedy, J.). The North Carolina redistricting plan will inevitably generate resentment -- not only among whites, but also among Native Americans, for whom the legislature cannot feasibly provide a quota of seats in Congress. 14

North Carolina's oddly shaped districts also make it more difficult for a member of Congress to represent constituents properly and maintain

awareness of their concerns. The result is frustration and resentment among voters.

# II. NO NEXUS EXISTS BETWEEN PAST RACIAL DISCRIMINATION IN NORTH CAROLINA AND RACE-BASED CONGRESSIONAL REDISTRICTING

Appellees and their Amici contend that evidence of past racial discrimination in North Carolina justifies the quotas used in the State's 1992 redistricting. 15 Although Appellants dispute that past racial discrimination could ever justify the racial quotas used by North Carolina in redistricting, they submit that here the purported justification falls especially short.

North Carolina has always used singlemember districts in electing Representatives to Congress. 16 There has

<sup>&</sup>quot;slippery slope". The problem of omitted ethnic groups is exacerbated as the state's population becomes ever more diverse racially and includes a substantial number of Hispanics and Asian-Americans. Moreover, the creation of majority-minority districts often leads to allegations of "packing" and "racial politics" like those made in Voinovich v. Quilter, supra, n.1.

<sup>15</sup> See, e.q., State Appellees' Brief on the Merits at pp.45-46.

<sup>&</sup>lt;sup>16</sup> As the Court recently reiterated, "we have, however, stated on many occasions that multi-member districting plans, as

been no legislative or judicial finding that any Congressional district has ever been drawn in North Carolina with the purpose or effect of depriving black voters of their right to elect to Congress the candidates they preferred; nor has there been any finding that any of the Congressional districts were drawn either with the purpose or the effect of fragmenting minority voters. Cf. Growe v. Emison, supra, n.1.

Whatever past sins of discrimination North Carolina may have committed against black voters by means of poll taxes, literacy tests, or otherwise, there has been no finding that these sins ever prevented the election of a black person to

Congress. 17 Indeed, the information submitted to the Court about the percentage of minority population which is black and the location of that population in North Carolina would strongly indicate that no such finding can be made. Under these circumstances, the North Carolina redistricting plan cannot be justified as a remedy for past discrimination; instead, it is an unearned and unwarranted racial

well as at large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts." See, Growe v. Emison, supra, n.1, at 4167.

<sup>17</sup> Appellants are unaware how many minority persons have run for Congress in recent decades. In any event, the boundaries used for Congressional districts have not been shown to have any connection with the circumstance that, until 1992, no black person had been elected to Congress from North Carolina in this century. Moreover, in Chisom v. Roemer, 111 S.Ct. 2345 (1991), the Court has explained that, under the Voting Rights Act, "inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights".

preference which impairs Appellants most basic right of citizenship.

III. THE STATE'S "PRIMARY RESPONSIBILITY"
FOR CONGRESSIONAL REDISTRICTING DOES
NOT JUSTIFY PURPOSEFUL RACIAL
DISCRIMINATION.

In their Supplemental Brief (at pp. 8-9), the State Appellees cite two recent opinions of this Court for the proposition that "the Constitution leaves with the primary responsibility for states federal apportionment of their legislative congressional state and See Growe v. Emison, 61 districts". U.S.L.W. 4163, 4166 (1993); Voinovich v. Quilter, supra, n.1 at 4199. This proposition -- although accurate -- is singularly irrelevant to the facts alleged in the Complaint; and, if anything, it undercuts State Appellees' position.

If Attorney General Barr had allowed North Carolina to exercise its "primary

plan would never have come into being. It was the Attorney General -- not the General Assembly -- who determined that the creation of two majority-minority congressional districts was required under Section 2 of the Voting Rights Act. Now it appears clear that the Attorney General erred in his interpretation and application of the Voting Rights Act. 18

Assistant Attorney General Dunne's

<sup>18</sup> In Voinovich, supra, n.1, the Court explained -- in a passage quoted by the State Appellees (Appellees' Supplemental Brief at p.6) -- that Section 2 "says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead Section 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect a candidate of its choice does it violate Section 2; where such an effect has not been demonstrated, Section 2 simply does not speak to the matter." 61 U.S.L.W. at 4202.

letter of December 8, 1991, "objected to the State's first plan on the ground that it failed to create a second majorityminority district". (Federal Appellees' Brief on the Merits at p. 11). Upon its receipt, the General Assembly -- instead of seeking judicial preclearance -- drew its second redistricting plan. Since, as the Complaint alleges, this plan was the product of federal pressure, ridiculous for the Appellees to try to defend the plan now by reliance on the State's "primary responsibility" redistricting.

Indeed, the State's claim of "primary responsibility" is another reason to view with suspicion the plan's creation of majority-minority districts. In Croson, the point was made "that Congress, unlike any State or political subdivision, has a specific mandate to enforce the Fourteenth

Amendment". 19 In Appellants' view the creation of majority-minority districts would violate the Fourteenth and Fifteenth Amendments, even if it were required by Congress; but the constitutional basis for such districts is much more questionable when they are created in the exercise of State, rather than federal, responsibility.

# IV. APPELLEES' RACIALLY DISCRIMINATORY INTENT WAS "INVIDIOUS"

The State Appellees have defended that their intent was "benign", rather than "invidiously discriminatory", because they acted in good faith to comply with the demands of the Federal Appellees. This defense is inconsistent with the reliance

between state and federal authority helps reconcile the result in <u>Croson</u> with the outcome in <u>Fullilove v. Klutznick</u>, 448 U.S. 448 (1980) (minority set-aside in federal contracts) and in <u>Metro Broadcasting</u>, Inc. v. FCC, 497 U.S. 547 (1990) (minority preference in allocation and distress sale of broadcast licenses.)

of the State Appellees on the "primary responsibility" of the General Assembly for the redistricting. If the State Legislature had such great responsibility, the State Appellees should not be excused because of the actions of Federal officials, whose reponsibility was not "primary".

The Appellees also misinterpret the term "invidious". In construing "invidious" in the related context of gender discrimination, the Court recently explained:

We do not think that the "animus" requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious) discrimination against women. does demand, however, at least a purpose that focuses upon women by reason of their sex -- for example (to use an example of assertedly benign discrimination), the purpose of "saving" women because they are women from a combative, aggressive profession such as the practice of law.

"Discriminatory purpose" implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of", its adverse effects upon an identifiable group. 20

In one sense, the Appellees' invidious racially discriminatory intent was directed against all the voters of North Carolina -- white and black -- for the redistricting plan purposefully subjected every voter to the adverse effects of a race-based electoral process that is "illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society". See A. Bickel, supra.

The invidious intent as to the five Appellants -- who are white -- can be more

Clinic, U.S.\_\_, 113 S.Ct. 753, 759-60 (1993).

readily perceived. If the Court accepted the "group rights" approach, on which Appellees rely, 21 both the State and Federal Appellees had invidious an discriminatory intent against whites as a Prior to the 1990 census, all group. eleven members of Congress from North Carolina were white; but in 1992, only ten of the twelve persons elected to Congress were white. Under Appellees' rights" logic, this reduction in the number of white members would be "retrogression"in the ability of whites to elect members of their race to serve in Congress. Since this "retrogression" was demanded by the Attorney General and the State Appellees acceded to that demand, all

the Appellees possessed an "invidious" discriminatory intent against Appellants and all other white voters.<sup>22</sup>

The most evident invidious discriminatory intent was directed by the State Appellees against Appellants Shaw and Shimm, whom Appellees' redistricting plan

<sup>&</sup>lt;sup>21</sup> Appellants, of course, continue to contend that a "group rights" approach is fatally flawed because voters' rights under the Fourteenth and Fifteenth Amendments are "personal".

<sup>22 28</sup> CFR § 51.54 (a) describes "Retrogression" in this way: "A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e. will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See Beer v. United States, 425 U.S. 130, 140-42 (1976)". If Appellees' "group rights" premise is accepted, Appellants cannot understand why members of a racial majority would be precluded from claiming that their own Fourteenth and Fifteenth Amendment rights have been violated by the "retrogression" in the majority's right to choose members of their own race to represent them in Congress. After all, equal protection was intended for all citizens -- not merely those who are members of a minority.

Twelfth Congressional placed in the As reflected in the bizarre District. shape of that district, the purpose of the State Appellees was to meet the Attorney General's requirements by assuring that the member of Congress elected from this district would be black. A subsidiary purpose was to limit the meaningful choice of the Twelfth District voters to black candidates. Moreover, it was recognized -and, indeed, intended -- that the member of Congress to be elected from this district would have a racial, rather than a geographic, constituency.23

The purpose of Appellees was to achieve certain results which they knew

would have adverse effects on Appellants and many other white voters<sup>24</sup> -- especially in the "grotesque" Twelfth Congressional District. Nevertheless, in order to perform what they believed to be "benign" social engineering, Appellees went ahead despite those inevitable adverse effects.<sup>25</sup> Under the test approved in Bray, supra, the Appellees' racially discriminatory intent was "invidious".

The odd shape of the Twelfth District and its demographics made it unlikely that white voters, such as Appellants Shaw and Shimm, could develop any community of interest with other voters or any meaningful relationship with their Representative.

as well as white, were victims of this unconstitutional redistricting plan. Indeed, a race-based electoral process is so "destructive of democratic society" that Appellees' redistricting plan will have an adverse effect on every citizen in North Carolina.

The adverse effects purposefully inflicted on them by Appellees' racially discriminatory redistricting plan give Appellants standing to bring this action. Moreover, Appellants submit that the adverse effects of the plan are so pervasive that any voter in North Carolina has standing to attack it under the Fourteenth and Fifteenth Amendments.

#### CONCLUSION

Appellants' Complaint alleged facts sufficient to establish that the State and Federal Appellees acted in concert, with an invidious racially discriminatory purpose, to violate Appellants' constitutional rights by creating two majority-minority congressional districts for the purpose of assuring that two black persons were elected to Congress from North Carolina. Therefore, the Order dismissing the Complaint should be set aside.

Respectfully submitted,

Robinson O. Everett\*
Counsel of Record
Everett, Gaskins, Hancock &
Stevens
Suite 300 FUNB Building
301 West Main Street
Durham, North Carolina 27702
(919) 682-5691

Jeffrey B. Parsons
Everett, Gaskins, Hancock &
Stevens
127 West Hargett Street
Raleigh, North Carolina 27602
(919) 755-0025

Counsel for Appellants

March 29, 1993

\* Counsel of Record

E I L E D

MAR 22 1993

No. 92-357

In the

OFFICE OF THE CLERK

## Supreme Court of the United States

October Term, 1992

Ruth O. Shaw, et al.,
Appellants,

V

Janet Reno, et al., Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

#### STATE APPELLEES' SUPPLEMENTAL BRIEF

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr., Senior Deputy Attorney General
H. Jefferson Powell\*, Special Counsel to Attorney General
Norma S. Harrell, Special Deputy Attorney General
Tiare B. Smiley, Special Deputy Attorney General

North Carolina Department of Justice Post Office Box 629 Raleigh, North Carolina 27602-0629 (919)733-3786

\*Counsel of Record

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# Supreme Court of the United States

October Term, 1992

Ruth O. Shaw, et al.,

Appellants,

V.

Janet Reno, et al., Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

#### STATE APPELLEES' SUPPLEMENTAL BRIEF

Six days after the state Appellees submitted their brief in this case, the Court decided Voinovich v. Quilter, \_\_ U.S. \_\_, 61 U.S.L.W. 4199 (March 2, 1993). In addition, Growe v. Emison, \_\_ U.S. \_\_, 61 U.S.L.W. 4163 (February 23, 1993), was not available in time to be included in the brief. Because these decisions address issues of direct relevance to the proper resolution of Shaw v. Reno, the state Appellees submit this supplemental brief discussing Voinovich and Growe pursuant to Sup. Ct. R. 25.5 (1991).

#### SUMMARY OF THE ARGUMENT

The Appellants' (hereafter "Plaintiffs") claim is that a state acts with discriminatory intent if it creates majority-minority congressional districts for the purpose of compliance with the

Voting Rights Act. The Plaintiffs thus seek a major revision of the traditional understanding that a state's intent is racially discriminatory only if the state made its decision at least in part because of the adverse effect the decision would have on a targeted racial group. Voinovich v. Quilter, however, applied the traditional view in rejecting a finding of discriminatory intent where the factual record showed race-consciousness but not invidious purpose on the part of the state actor.

Voinovich held that § 2 of the Voting Rights Act does not proscribe majority-minority districts unless they are shown to result in minority vote dilution. The decision thus forecloses the Plaintiffs' statutory argument that the Act should be construed to forbid race-conscious redistricting. After Voinovich, it is clear that the Plaintiffs' arguments necessarily attack the constitutionality of §§ 2 and 5 of the Act. Voinovich and Growe v. Emison, furthermore, reaffirmed the responsibility of state legislatures for congressional redistricting; the logical implication of the decisions is that the North Carolina plan under challenge in this case is constitutional.

#### ARGUMENT

I. VOINOVICH v. QUILTER APPLIED THE TRADI-TIONAL DOCTRINE OF DISCRIMINATORY IN-TENT:

The heart of the Plaintiffs' constitutional claim is their contention that North Carolina's deliberate creation of two majority-minority congressional districts in order to comply with the Voting Rights Act, 42 U.S.C. § 1973 et seq., should be treated as intentional racial discrimination. See Amendment to Comp. ¶ 36(A), J.S. App. at 101a-04a. Voinovich v. Quilter, \_\_ U.S. \_\_, 61 U.S.L.W. 4199 (March 2, 1993), did not directly answer the

question of whether a "State's conscious use of race by itself violates the Fifteenth Amendment," id. at 4203, or the Equal Protection Clause, id. at 4202. The decision, however, clearly demonstrates the Court's continued adherence to the traditional requirement that plaintiffs bringing race-based constitutional claims must be able to allege the existence of an invidious discriminatory purpose directed against a particular racial group.<sup>2</sup>

The plaintiffs in Voinovich claimed that the Ohio state apportionment board violated the Fourteenth and Fifteenth Amendments and § 2 of the Voting Rights Act, 42 U.S.C. § 1973, in redrawing Ohio's state legislative districts in 1991. According to the plaintiffs, the board "'packed' black voters by creating districts in which they would constitute a disproportionately large majority;" the board thereby allegedly "minimized the total number of districts in which black voters could select their candidate of choice." Id. at 4200. The board's stated purpose of compliance with the Act was, the plaintiffs asserted, a pretext concealing the deliberate dilution of African-American voting strength. The district court agreed, finding that the board had intentionally

The Plaintiffs base their claim against the State on both the Equal Protection Clause and the Fifteenth Amendment. As the Court observed in Voinovich v. Quilter, the applicability of the Fifteenth Amendment to vote-dilution claims stemming from legislative reapportionments has not been determined. 61 U.S.L.W. at 4202 (March 2, 1993). The possible differences between the scope of the two Amendments, however, are not relevant in this appeal: it is settled law under both that a plaintiff must allege discriminatory intent in order to state a claim. Compare Voinovich, id. (Fifteenth Amendment) with Washington v. Davis, 426 U.S. 229, 240 (1976) (Fourteenth Amendment). The Plaintiffs' claim fails because they have not alleged that North Carolina acted with invidious discriminatory intent as this Court's decisions, including Voinovich, employ that concept.

<sup>&</sup>lt;sup>2</sup> See McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (viable race-based equal protection claim must allege that state acted "because of" adverse effect on an identifiable group).

discriminated against black voters in violation of the Fifteenth Amendment. Quilter v. Voinovich, 794 F. Supp. 756, 757 (N.D. Ohio 1992).

On appeal, this Court reversed the lower court's constitutional holding because its finding of discriminatory intent was clearly erroneous. 61 U.S.L.W. at 4202. The reasons the Court gave for rejecting the finding show that the Court applied the traditional concept of invidious discriminatory intent.3 The Court observed that nothing in the record indicated that the draftsman of the redistricting plan had pursued a "discriminatory strategy" of "diluting minority voting strength." Id. at 4203. The fact that the draftsman disregarded state law requirements and purposefully created majority-minority districts where he believed compliance with the Voting Rights Act required him to do so "does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the United States Constitution." Id. The Ohio reapportionment board's reliance on suggestions by "sources that were wholly unlikely to engage in or tolerate intentional discrimination against black voters" such as the Ohio NAACP "directly contradicts the District Court's finding of discriminatory intent." Id.

This Court's decision to reject a factual finding entitled to deference under the clear-error standard of Fed. R. Civ. P. 52 evidences the Court's adherence to the principle that a constitutionally invidious intent necessarily involves the purposeful imposition of harm on a racial group as such. The record showed that the

state decisionmaker had acted race-consciously; it did not support the conclusion that the action was motivated in any way by a desire to impose "adverse effects" on any racial group. Indeed, the draftsman's intention of complying with the Voting Rights Act and the approval of the plan by "sources wholly unlikely to engage in . . . intentional discrimination against black voters" demonstrated that the purposes underlying it were legitimate rather than invidious.

The parallels between Voinovich and the present case are striking. North Carolina's purpose in creating two majorityminority districts, as described by the Plaintiffs themselves, was to conform to the Voting Rights Act as administered by the Attorney General, and thus to satisfy the State's constitutional obligation of "obedience to the Supremacy Clause." The legis.ature that approved North Carolina's present congressional districts was predominantly white; its white members assuredly were "wholly unlikely to engage in or tolerate intentional discrimination against" white voters. If the Plaintiffs' argument were correct that the mere fact that a state took race into account renders its intent invidious, the finding of discriminatory intent in Voinovich would have been upheld on appeal. The Court, however, reached the contrary result and did so on the basis of reasoning that started from the assumption that a state acts with "discriminatory intent" only when it chooses a course of action because of its adverse effects on a racial group. In the present case, this Court should adhere to the constitutional principles it applied in Voinovich and reject the Plaintiffs' claim.

<sup>&</sup>quot;"[D]iscriminatory purpose," . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." McCleskey v. Kemp, 481 U.S. at 298, quoting Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979).

II. THE PLAINTIFFS' CLAIM THAT THE STATE'S REDISTRICTING PLAN VIOLATES THE VOTING RIGHTS ACT IS FORECLOSED UNDER VOINOVICH v. QUILTER.

The Plaintiffs' statutory claim, in their amended complaint, is that the Voting Rights Act "does not authorize or permit a State legislature" to create majority-minority congressional districts. Amendment to Comp. ¶ 2(A), J.S. App. at 104a. Voinovich v. Quilter directly addressed and squarely rejected that view of the Act with respect to § 2, 42 U.S.C. § 1973. In Voinovich, the district court "held that § 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation." 61 U.S.L.W. at 4202. This Court disagreed.

Section 2 contains no per se prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect a candidate of its choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.

Id.<sup>4</sup> The Plaintiffs' statutory claim, which rests on their reading of § 2, see Comp. ¶ 24, J.S. App. at 85a-86a (citing 42 U.S.C. § 1973(b)), thus is foreclosed by Voinovich.

In light of the fact that this Court's § 5 decisions have consistently approved majority-minority redistricting as a means of satisfying the obligations of covered jurisdictions under that section, see, e.g., Beer v. United States, 425 U.S. 130 (1976),5 it is plain that Plaintiffs have no cause of action under the Voting Rights Act. As a matter of statutory construction, it now is clear that neither § 2 nor § 5 forbids race-conscious redistricting, and that in appropriate circumstances, either may require the creation of majority-minority districts.6 This is an unsurprising conclusion, but it highlights a crucial feature of this case: the Plaintiffs' constitutional claim necessarily impugns the validity of §§ 2 and 5 of the Act. Their argument thus questions not only the State's exercise of its "primary responsibility for apportionment of [its] federal congressional . . . districts," Growe v. Emison, U.S. \_\_, 61 U.S.L.W. 4163, 4166 (February 23, 1993), but also Congress's power under the Reconstruction era amendments to

<sup>&</sup>lt;sup>4</sup> See also id. at 4202 (rejecting argument that state must prove existence of a § 2 violation before it can create majority-minority districts).

A covered jurisdiction's § 5 obligation to demonstrate that changes in its election laws "will not have an adverse impact on minority voters," McCain v. Lybrand, 465 U.S. 236, 247 (1984), necessarily requires a covered state to take the racial consequences of redistricting plans into account in adopting one. It is not without significance that the appellees in Voinovich, who unsuccessfully urged this Court to interpret § 2 to forbid the purposeful creation of majority-minority districts in the absence of a finding of minority vote dilution, conceded that the Voting Rights Act "authorizes and may compel the creation of majority-minority districts where Section 5 is at issue." Brief for Appellees, Voinovich v. Quilter, No. 91-1618, at 16.

<sup>&</sup>lt;sup>6</sup> Since a redistricting plan that had the unintended effect of diluting a protected group's voting strength would violate § 2, the *only* means a conscientious state legislature has of insuring that it redistricts in conformity with § 2 is to consider the effects of possible plans on minorities and, where necessary, to take race-conscious measures to avoid dilution of their voting strength.

The Plaintiffs have been understandably reluctant to emphasize the implications of their claims for the Voting Rights Act, but as amended their complaint explicitly asks that the Act be declared unconstitutional pro tanto "if [it] does permit or authorize a State legislature" purposefully to create majority-minority districts. Amendment to Comp. ¶ 2(A), J.S. App. at 105a.

"define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.). The Plaintiffs' attack on the constitutionality of key provisions of the Act contradicts Congress's considered judgment in the exercise of its powers as well as this Court's decisions upholding that judgment. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966) (sustaining the constitutionality of the Voting Rights Act as an exercise of Fifteenth Amendment power); City of Rome v. United States, 446 U.S. 156, 180-82 (1980). As a matter of constitutional principle and precedent, the Court should reject the Plaintiffs' "invitation to overrule Congress's judgment that the [1982] extension [of the Act] was warranted." City of Rome, 446 U.S. at 180.

### III. THE GROWE AND VOINOVICH DECISIONS REAF-FIRM THE PRIMARY RESPONSIBILITY OF STATE LEGISLATURES FOR CONGRESSIONAL REDIS-TRICTING.

Both of this Court's most recent Voting Rights Act decisions emphasize the central role that the states are intended to play in congressional redistricting. Growe v. Emison held that a federal district court "erred in not deferring to the state court's timely consideration of congressional reapportionment." 61 U.S.L.W. at 4167. "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." Id. at 4166. Accord Voinovich v. Quilter, 61 U.S.L.W. at 4202.

Shaw v. Reno presents even less reason for federal court intervention into the "highly political task" of redistricting, Growe, 61 U.S.L.W. at 4165, than did the facts of Growe or Voinovich. North Carolina, unlike the states involved in those cases, is in effect a covered jurisdiction under § 5 of the Voting Rights Act. It thus has a statutory duty to demonstrate that changes in its congressional districts are free both of invidious purpose toward and of discriminatory effects upon minority voters. A state obviously may not exercise its redistricting powers or attempt to obey federal statutes by means that affirmatively violate federal constitutional prohibitions. In enacting the plan challenged in this case, however, North Carolina carried out its "primary responsibility" for redistricting by means conforming to federal law, means which this Court has repeatedly approved in the context of § 5 and which Congress sanctioned in the enactment and amendment of the Voting Rights Act. In the absence of any allegation that the State's actual purpose was to harm any racial group, the Plaintiffs' racebased constitutional claim must fail.

#### CONCLUSION

The Court should affirm the judgment of the United States
District Court for the Eastern District of North Carolina dismissing
the Plaintiffs' complaint.

Respectfully submitted,

MICHAEL F. EASLEY North Carolina Attorney General

H. Jefferson Powell\*
Special Counsel to the Attorney General

Edwin M. Speas, Jr. Senior Deputy Attorney General

<sup>8</sup> The Court rejected as irrelevant under the particular facts of Growe that it was the state courts rather than the state legislature that would have reapportioned the state's congressional and legislative seats. 61 U.S.L.W. at 4166.

Norma S. Harrell Special Deputy Attorney General

Tiare B. Smiley Special Deputy Attorney General

North Carolina Department of Justice Post Office Box 629 Raleigh, North Carolina 27602-0629 (919) 733-3786

March 1993

\*Counsel of Record

No. 92-357

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IN THE

## Supreme Court of the United States

October Term, 1992

RUTH O. SHAW, et al.,

Appellants,

V.

WILLIAM BARR, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF APPELLANTS

MARC D. STERN
Counsel of Record

Lois C. Waldman
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 360-1545

### QUESTION PRESENTED

(1) Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

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#### INTEREST OF THE AMICUS

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the political, civil and economic rights of American Jews and all Americans. It believes that the rights of Jews are not secure unless the rights of all Americans are secure.

To this end, the AJCongress has long supported legislation, including the Voting Rights Act, to enlarge the franchise so that all Americans may take an active and equal role in the governance of our democratic society. AJCongress has likewise initiated or supported litigation challenging all manner of racially exclusionary electoral devices, including literacy taxes, poll tests and intentionally segregated districts.

In supporting these efforts to achieve electoral equality, AJCongress thought that it was urging color-blind elections, where government above all would not insist on the relevance of racial matters.

Given the secret ballot, government cannot prevent people from voting on a racial, religious, sexual, or ethnic basis. These are essential elements of who Americans are. It is therefore understandable, if not necessarily admirable, that such voting takes place. But under our constitutional system, it is one thing to tolerate such voting. It is quite another for government to design districts to reinforce racial, ethnic, religious or sexual voting patterns, and to make these factors the central organizing features of political affairs.

**AJCongress** has steadfastly The opposed the effort to convert the principle of full, fair, and equal participation in the electoral process into a system of ethnic, religious, or racial fiefdoms. As this case and other cases before the Court this Term illustrate, that is no longer an abstract fear, but a real threat to the health of our pluralistic democracy. We file this brief in order to help clarify the line between banning discrimination in the electoral process and ensconcing race at the heart of that process.

This brief is filed with the consent of the parties. Letters of consent are on file with the Clerk.

#### SUMMARY OF ARGUMENT

This Court has posed the question of whether a state redistricting plan, drafted to remove an objection by the United States Department of Justice under the Voting Rights Act to its districting plan in wholly immune from suit, even if the State plan departs substantially from the plan proposed by the Department.

The constitutional questions lurking in this case are substantial, going as they do to the limits on congressional power to mandate that race be a permanent feature of the electoral system. While some decisions of the Court suggest that Congress enjoys broad powers in this area, and may empower or require others to implement remedial racial criteria, other decisions suggest substantial limits on Congress' authority.

Those questions merit the Court's attention, but they need not be addressed here. The predicate for answering those questions is that the Voting Rights Act was violated by the State of North Carolina when it adopted its first districting plan. However, the Department of Justice in this case interpreted the Voting Rights Act to require that a majority-minority district be established merely because it was possible to do so. The Act, however, specifically repudiates such an interpretation, which is nothing less than a claim for proportional representation.

Perhaps more lies behind the Department of Justice's letter than appears. But the court below held that appellants could not prove any conceivable set of facts which would entitle it to relief. Unless the Court is prepared to

hold that once the Voting Rights Act enters the case, no constitutional restriction on the use of race under the Voting Rights Act (and, indeed, that the Voting Rights Act poses no such restrictions), the dismissal of the complaint for failure to state a claim cannot be sustained. Accordingly, this case should be remanded for further proceedings.

#### ARGUMENT

The issue this Court has directed be briefed and argued is the extent to which a state's purported compliance with the Voting Rights Act at the behest of the Attorney General immunizes its redistricting plan from attack as an unconstitutional racial gerrymander. That is no doubt a significant question, calling into question the extent to which United Jewish Organizations of

Williamsburgh v. Carey, 430 U.S. 144 (1977), cited with approval in Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997, 3019 (1990), remains consistent with some of the Court's other pronouncements on 'remedial' uses of race, e.g., City of Richmond v. J.A. Croson, Inc., 488 U.S. 469 (1989), and the extent, if any, to which a general federal command to use race as a remedial device immunizes discretionary state action under that authority from constitutional attack. We have no occasion to address those questions here, for we believe that the question the Court directed be briefed and argued makes an assumption about the action of the Justice Department which is without basis in this case.

The question assumes that the Attorney General acted pursuant to the Voting Rights Act in interposing an

objection to North Carolina's original districting plan. Whatever else may be said about the Attorney General's action, and North Carolina's response, it surely cannot be said to have been taken in compliance with the requirements of the Voting Rights Act.

The Attorney General's objection in this case rests on the first redistricting plan's "clear violation of Section 2 of the Act" [55a], not on a \$ 5 regression claim. Beer v. United States, 425 U.S. 130 (1976). The cases cited by the Attorney General in his letter of objection to describe the substantive scope of the Voting Rights Act are \$ 2 cases, not ones arising under \$ 5 of the Act. The viability of the Attorney General's objection depends, then, on the correct application of \$ 2 principles.

Section 2 is not easy to apply. But surely it is clear that a violation of § 2 is not made out merely by an absence of specific relation between the number of minorities and the number of persons belonging to that minority elected. The Act says so in unmistakably clear terms: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Similarly, the Voting Rights Act does not require that districts be drawn solely in order to create minority districts just because it is possible to do so.1

Largely to give meaning to those sections, as well as to the Act's protection for minority political power,

<sup>1.</sup> A state might want to adopt such a policy, which constitutionality could then be tested. But that is not the case, nor is it the question that this Court has asked be briefed.

Thornburg v. Gingles, 478 U.S. 30 (1980), this Court's only opinion to date on the substantive reach of § 2, mandated a complex inquiry into the political realities in a jurisdiction as a prerequisite for establishing existence of a § 2 violation.

Relying heavily on Senate Report 97-417, 97th Cong. 2d Sess., 1982 U.S. Code, Cong. & Admin. News (1982) p.28, the Court adopted a totality of the circumstances test, see 478 U.S. at 37, 48. Under Gingles, the minority challenging a districting decision must prove<sup>2</sup> at the

<sup>2.</sup> When a § 2 claim is incorporated into a § 5 objection there is a significant shift in the burden of proof. Under § 5, the burden of proof is on the jurisdiction to prove the absence of prohibited adverse impact on minorities. Yet an important part of this Court's construction of § 2 — and of the Senate Committee's explanation of why the 1982 Amendments did not create a system of proportional representation — is that the burden of proving all the elements of a § 2 violation rested with those challenging a government action as discriminatory.

threshold that a minority group is politically cohesive, that it is sufficiently large and geographically compact to constitute a majority, and that racially polarized voting exists in the jurisdiction. After determining that these threshold requirements are met, the courts must consider the remaining factors enumerated in the Senate Report.

Leaving aside the extent to which the Gingles criteria are applicable to single-member districts (an issue we have adverted to in our amicus brief in Wetherell v. DeGrandy, 92-519 (Oct. Term 1992), these three threshold criteria, to say nothing of the more complex eightpoint inquiry required by the authoritative Senate Report, were not applied by the Attorney General in this case.

The findings of the Attorney General in regard to the United States House of Representatives are as follows:

As in the House and Senate plans, however, the proposed configuration of the district boundary lines in the southcentral to southeastern part of the state appear to minimize minority voting strength given significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state.

We also note that the state was well aware of the significant interest on the part of minority community in the creating a second majorityminority congressional district in North Carolina. For the south-central to southeast area, there were several plans drawn providing for a second majorityminority congressional district, including at least one alternative presented to the legislature. No alternative

plan providing for a second majority-minority congressional district was presented by the state to the public for comment. Nonetheless, significant support for such an alternative has been expressed by the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU). These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but despite this fact, such configuration for a second majority-minority congressional district was dismissed for what be to pretextual appears Indeed, some comreasons. mentors have alleged that the state's decision to place the concentrations minority of voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength. Such submergence will have the expected result of "minimiz[ing] or cancel[ing] out the voting strength of [black and Native American minority voters." . . . Although invited to do so, the state has yet to provide convincing evidence to the contrary. [citations omitted]

Perhaps the underlying facts support a § 2 (or even a § 5) claim. But for all that appears in the Attorney General's letter of objection, North Carolina did nothing worse than refuse to draw a possible minority district. The letter does not assert that these minorities were politically cohesive or shared anything in common beyond the color of their skin.

Nor was there any finding that the original configuration left minorities unable to elect a representative of their choice, unless, of course, a representative of one's choice is defined solely in terms of the racial identity of the successful candidate, a position which is untenable in light of its rejection by Congress in the last sentence of 42 U.S.C. 1973(b) and by this Court in Thornburg v. Gingles, supra, 478 U.S. at 62 (1986).

This case comes to this Court on appeal from a successful motion to Civ. P. dismiss. F.R. 12(b)(6). Translated into constitutional terms, the effect of that dismissal is that no matter what the facts, no matter what the deficiencies in the action of the United States Department of Justice administering the Act, no matter how far a state departs from a suggested remedy proposed by the Department of Justice, no matter how bizarre the resulting District, no matter what its impact on whites within the majority-minority district, no matter how distinct those whites are from other whites in the jurisdiction, no matter how long after prior electoral and other forms of discrimination have been eradicated racially-based districting takes place, no constitutional or statutory claim can be stated. This cannot be the law, or more

precisely, if it is the law, it is this Court which should say so directly and plainly.

The construction of the Act apparently adopted by the Department of Justice poses substantial constitutional questions. United Jewish Organizations of Williamsburgh plainly sanctioned some remedial use of race in the districting process. That decision was rendered under a section of the Voting Rights Act which was temporary, and not, as § 2 now is, a permanent feature of the law.

This Court has frequently held that the remedial use of race cannot be authorized in perpetuity, as § 2 does.

City of Richmond v. J.A. Croson, supra. It is true that pursuant to Amendment XIV,

§ 5, the Court has allowed great leeway for congressionally authorized uses of race to remedy discrimination, Fullilove

v. Klutznick, 448 U.S. 448 (1980); Metro Broadcasting, Inc. v. FCC, supra, and has suggested that the holding in United Jewish Organizations of Williamsburgh is consistent with those holdings. Metro Broadcasting, Inc. v. FCC, supra.

However, even in those cases this Court was careful to hold that the use of race cannot be justified indefinitely as a remedial device, nor can racial criteria be used to maintain some sort of permanent racial balance. Metro Broadcasting, Inc. v. FCC, supra.

Moreover, in United Jewish Organizations of Williamsburgh this Court
emphasized that it was considering a
gerrymandered district which was geographically cohesive, that more or less
accorded with social and political
realities already existing on the ground.
The challenged district in this case has

none of these saving graces. There is no way to explain the challenged district but as a means to provide a racial result.

How to reconcile these conflicting constitutional holdings is not at all obvious, and we do not now suggest such a reconciliation. We recognize the importance of the Voting Rights Act, the persistence of subtle (and not so subtle) efforts to disenfranchise or dilute the political power of minorities, and the great power accorded Congress to address the lingering effects of past discrimination.

But we also know that the singleminded focus on racial districting has a
deleterious impact on the body politic,
and one inconsistent with government's
constitutional obligation. That is the
gist of this Court's holding invalidating
a Louisiana statute which required

candidates to be identified on the ballot by race. Anderson v. Martin, 375 U.S. 399, 462 (1964) ("The vice lies . . . in placing the power of the State behind a racial classification that induces racial prejudice in the polls.")

Whatever may be the resolution of a direct constitutional challenge to the line that Congress has drawn in balancing the claim for minority empowerment with the ultimate goal of purging race from the ballot box, it surely is not the case that serious and substantial allegations that a state has upset this delicate balance and gone too far in tilting toward a system of racial gerrymanders -- where a district's sole unifying fact is race -- cannot state a claim under either the Act or the Constitution. In view of the longstanding and well-settled preference for deciding statutory issues prior to

constitutional claims, this case should be remanded for consideration of whether the Voting Rights Act itself required more of North Carolina than its first plan provided.

#### CONCLUSION

To sustain a dismissal for failure to state a claim,

the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1955). Accord Neitzke v. Williams, 109 S.Ct. 1827, 1832 (1989). As we have indicated, that high standard was not met here.

Accordingly, the judgment should be reversed, and the case remanded for a determination of whether the first

districting plan violated § 2, and then, and only if necessary, whether the remedy adopted exceeded the limits imposed by the Constitution.

Respectfully submitted

Marc D. Stern
(Counsel of Record)
Lois C. Waldman
American Jewish Congress
15 East 84th Street
New York, NY 10028
(212) 360-1545

January 19, 1993

No. 92-357

E I L E D

JAN 2 1 1993

OFFICE OF THE CLERK

#### IN THE

# Supreme Court of the United States October Term, 1992

Ruth O. Shaw, et al.

Appellants,

v.

William Barr, et al.

Appellees.

### On Appeal from the United States District Court for the Eastern District of North Carolina

### BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLANTS

BENJAMIN L. GINSBERG
MICHAEL A. HESS\*
DALTON L. OLDHAM
310 First Street, S.E.
Washington, D.C. 20003
(202)863-8638
Counsel for Amicus Curiae
Republican National Committee

\*Counsel of Record January 21, 1993

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#### IN THE

## Supreme Court of the United States OCTOBER TERM, 1992

No. 92-357

Ruth O. Shaw, et al.

Appellants,

V.

William Barr, et al.

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

#### BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLANTS

The Republican National Committee submits this brief as amicus curiae in support of appellants' claim that the judgment of the United States District Court for the Eastern District of North Carolina, entered on August 7, 1992, should be reversed. Pursuant to Rule 37.2, all parties to this appeal have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of this Court.

#### INTEREST OF THE AMICUS

The Republican National Committee is a non-profit, unincorporated association which has participated in a variety of election law and voting rights cases before this Court as either a

party or amicus, including: Karcher v. Daggett, 462 U.S. 725 (1983); Davis v. Bandemer, 478 U.S. 688 (1989); and Thornburg v. Gingles, 478 U.S. 30 (1986). The Republican National Committee and its membership support fair and effective representation for citizens of North Carolina, and believe that the challenged congressional redistricting plan and the judgment of the court below impede such a result.

#### SUMMARY OF ARGUMENT

Amicus Republican National Committee supports appellants' contention that the challenged congressional redistricting plan was an intentional race-conscious gerrymander which had the effect of dissecting demonstrable geographic, jurisdictional, racial and political communities. The Republican National Committee does not take a position on whether such redistricting is unconstitutional per se, but suggests that, at a minimum, appellants' allegation of discriminatory intent and effect create a presumption of unconstitutionality that can only be overcome by evidence of a legitimate and compelling state interest.

This Court's opinions in Karcher v. Daggett and Davis v. Bandemer suggest that the challenged plan must be examined for legitimate underpinnings reflecting legitimate state interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives. No such valid underpinnings exist in this case, and the state's purported justifications -- the mandates of the Voting Rights Act and the recommendations of the Attorney General of the United States -- are mere pretexts for unconstitutional gerrymandering, the principal goal of which was incumbency protection.

Amicus Republican National Committee believes that this Court's opinion in United Jewish Organizations v. Carey, 430 U.S. 144 (1977), permits a finding in favor of the appellants while leaving this Court's precedents -- and the Voting Rights Act -- intact. While that case endorsed the goal of fair representation for minorities pursuant to Section 5 of the Act, it suggested that minority districts should be created "employing sound redistricting

principles such as compactness and population equality," with deference to existing "residential patterns." *Id.*, 430 U.S. at 168. When measured against any neutral standard of sound redistricting, the challenged plan fails.

Not only does North Carolina's congressional redistricting stand contrary to this Court's requirement of geographic compactness in *Thornburg* v. *Gingles*, it fails when measured against virtually all other neutral, manageable and time-honored redistricting criteria.

Amicus Republican National Committee respectfully urges the Court to consider these criteria, not only in the context of the Voting Rights Act, but in all redistricting contexts, particularly in cases where, as here, race is the surrogate used to achieve the political goal of incumbency protection.

#### **ARGUMENT**

# I. NORTH CAROLINAS' CONGRESSIONAL DISTRICTS ARE DISCRIMINATORY IN INTENT AND EFFECT, AND CANNOT BE CONSTITUTIONALLY JUSTIFIED.

In noting probable jurisdiction in this case, this Court directed all parties to brief the following question:

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

61 U.S.L.W. 3418 (Dec. 7, 1992).

Amicus Republican National Committee suggests that the answer to the Court's question is a resounding "No," because the North Carolina General Assembly devised a plan discriminatory in

both intent and effect, with no consistent, legitimate state policy justifications.

Appellants in this case clearly demonstrated that they can prove that the challenged plan was a race-conscious gerrymander. In his dissenting opinion, District Judge Voorhees points to:

...[a] constitutionally suspect, and potentially unlawful, intent on the part of the State Defendants. Moreover, the majority assumes that, because the North Carolina General Assembly is controlled by a white majority, the State Defendants could not have held an invidious discriminatory intent against Plaintiffs. ... I question the validity of such an assumption. The shift of the proposed minority-majority district from south-central or southeast North Carolina to the piedmont area of the State and the contorted shape of the Twelfth District could be indicative of a racial animus against eastern North Carolina black voters or piedmont North Carolina white voters.

#### J.S. App. A at 44a.

These district configurations have the clear effect of dissecting demonstrable geographic, jurisdictional, racial and political communities of interest. The "inescapable human effect of this essay in geometry and geography," *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), is neither mitigated nor justified by any compelling state interest.<sup>1</sup>

In Gaffney v. Cummings, 412 U.S. 735 (1973), this Court noted that the Connecticut redistricting plan at issue undertook "not to minimize or eliminate the political strength of any political group or party, but to recognize it and, through districting, provide

a rough sort of proportional representation" of the two major political parties, by taking into account party voting results in the three preceding statewide elections. *Id.* at 754. While *Gaffney* demonstrates that it may be legitimate for a state to take competing political interests into account in redistricting, it does not support the action taken by the North Carolina General Assembly, since there was no claim of invidious discrimination in *Gaffney*.

The North Carolina plan stands in clear contrast to the fourteenth and fifteenth amendments' prohibitions on restricting voting rights on account of race. In Gomillion, this Court concluded that when "a legislature thus singles out a readily isolated minority for special discriminatory treatment, it violates the Fifteenth Amendment." 364 U.S. at 346. In the municipal boundary plan challenged in Gomillion, blacks were effectively "fenced out" of the City of Tuskegee. In North Carolina, blacks have been "fenced into" bizarre distric's that serve no benign or legitimate purpose, in light of the alternatives available to the General Assembly. Indeed, the sole discernible purpose behind the shape of these districts is the preservation of white incumbents.

If North Carolina's congressional districts are not unconstitutional per se, they should be invalidated on the basis of the balancing test used by this Court in Karcher v. Daggett, 462 U.S. 725 (1983). In Karcher, this Court concluded that plaintiffs' success in proving that the challenged congressional plan "was not the good-faith effort to achieve population equality [shifted the burden] to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." 462 U.S. at 740.

#### This Court determined that:

[the] State must ... show with some specificity that a particular objective required the specific deviations in its plan, rather than relying on general assumptions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with

<sup>&</sup>lt;sup>1</sup> Amicus does not take a position on whether, upon a showing of discriminatory intent and effect, race-conscious redistricting is unconstitutional per se. It may be that there is a presumption that race has been used for an invidious purpose, a presumption that can only be overcome by evidence of a legitimate and compelling state interest.

which the plan as a whole reflects those interests, and the availability of alternatives which might substantially vindicate those interests yet approximate population equality more closely.

462 U.S. at 741 (emphasis added).

A similar approach was suggested in *Davis v. Bandemer*, 478 U.S. 109 (1986), where this Court summarized the requirements for making an equal protection challenge to a gerrymander:

If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings. Thus, evidence of exclusive legislative process and deliberate drawing of districts in accordance with accepted gerrymandering principles would be relevant to intent, and evidence of valid and invalid configuration would be relevant to whether the districting plan met legitimate state interests.

Id. at 141.

The use of a similar test would be appropriate here where, as in *Karcher*, alternative plans with less radical effects were available to the General Assembly. The only credible justification for these districts is the desire for incumbency protection, which is insufficient justification to overcome the state's heavy burden.

# II. THE NORTH CAROLINA GENERAL ASSEMBLY USED THE VOTING RIGHTS ACT AS A PRETEXT FOR UNCONSTITUTIONAL CONGRESSIONAL REDISTRICTING.

The appellees here would argue that North Carolina's congressional districts were necessitated by a reliance on the mandates of the Voting Rights Act and the recommendations of the Attorney General of the United States in enforcing the Act. In reality, the General Assembly used the Act and enforcement by the

Attorney General as a pretext to achieve unconstitutional ends. Cf. Karcher v. Daggett, 462 U.S. at 742-744.<sup>2</sup>

It cannot be credibly suggested that the Voting Rights Act of 1965, as amended, requires the creation of congressional districts of the sort at issue here. Even if the Voting Rights Act were to be construed in the pretextual manner argued by appellees, nothing in the Act or its application by the Attorney General would have required the convoluted and irrational intertwining of districts embodied in the challenged plan.

The existence and availability of alternative plans which create two majority-minority districts, while remaining contiguous and relatively compact, belie any suggestion that districts of the sort concocted by the North Carolina General Assembly are required by the Voting Rights Act. Indeed, rather than complying with the Voting Rights Act, North Carolina attempted to use the rejection of its plan by the Attorney General as a shield to implement race-conscious political gerry mandering that it hoped would be beyond the reach of the courts. See Voorhees, J., dissenting, J.S. App. A at 30a. As Judge Voorhees noted in his dissent:

It seems implausible that even the fiercest partisan of the Voting Rights Act would have imagined, at the time of its inception, that the Act gave carte blanche to white dominated state legislatures to draw districts virtually immune from judicial review, so long as the cry is raised: 'We are only complying with the Voting Rights Act.'

#### J.S. App. A at 40a-41a.

Nothing in Section 2 or Section 5 of the Voting Rights Act requires that jurisdictions create districts without respect to other considerations, such as compactness, contiguity and the geographic

<sup>&</sup>lt;sup>2</sup> Amicus Republican National Committee does not believe it necessary to reach the issue raised by the appellants regarding the disclaimer against proportional representation in 42 U.S.C. § 1973 in order to answer the question presented by this Court in the negative.

distribution of the minority group's members. Rather, the Voting Rights Act is meant to ensure that minority population concentrations are neither fragmented so that protected minorities are denied districts in which they have a "realistic opportunity to elect candidates of their choice," nor packed or collapsed into districts in such a fashion as to waste minority voting strength.<sup>3</sup>

The December 18, 1991 letter from Assistant Attorney General John Dunne denying preclearance of an earlier congressional bill ("Dunne letter") indicated that the configuration of Congressional District 2 (the only black majority district in the initial congressional submission from North Carolina)<sup>4</sup> was not required to achieve the purpose of avoiding minority vote dilution: "The unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and indeed, at least one alternative configuration was available that would have been more compact." Dunne letter at 4.5

It is simply inaccurate to suggest that the tortuous shape of the black majority—congressional districts in either that first submission or subsequent submissions were required to comply with Section 5.

Moreover, neither the Voting Rights Act nor the Attorney General of the United States can be blamed for the tortuous construction of districts *outside* the minority areas, including the convoluted and irrational intertwining of Districts 5, 9, 10 and 11 in the western part of the state, where the racial minority population is minimal. In fact, of the ten counties fragmented in this part of the state, only Cleveland County is a covered jurisdiction under § 5 of the Voting Rights Act. 28 C.F.R. Part 51, Appendix.

The preclearance denial letter from Assistant Attorney General Dunne also indicated that failure to create a second "majority minority" district in the southeastern portion of the state had led to a Justice Department decision to deny preclearance to North Carolina's initial congressional submission.

[The] proposed configuration of the district boundary lines in the south central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this area of the state.

Dunne letter at 5 (emphasis added). The suggestion by the Attorney General that a second majority-minority district be drawn in the *southeastern* portion of the state cannot have mandated the North Carolina General Assembly to create a snakelike majority-minority district in the *central part of the state*, nor the bizarre and uncouth configurations in the *western* part of the state.<sup>6</sup>

<sup>&</sup>lt;sup>3</sup> See B. Grofman and L. Handley, *Identifying and Remedying Racial Gerrymandering*, VIII J. L. & Pol. 345 (1992).

<sup>&</sup>lt;sup>4</sup> Subsequently revised somewhat in shape and renumbered as District 1 in the challenged plan.

<sup>&</sup>lt;sup>5</sup> Reproduced in *Pope* v. *Blue*, No. 91-2038, J.S. App. D at 54a. Appellants referred to and incorporated by reference the Jurisdictional Statement in this case. *Shaw*, J.S. at 3, 8. It is further the understanding of *amicus* Republican National Committee that the appellants intend to lodge copies of the Jurisdictional Statement in *Pope* with the Clerk of this Court.

<sup>&</sup>lt;sup>6</sup> The Attorney General's consistent position has been that the Voting Rights Act does not force jurisdictions to draw convoluted districts. In a November 18, 1991 letter which precleared the Texas congressional redistricting plan, despite contorted districts, Assistant Attorney General Dunne stated:

While we are preclearing this plan under Section 5, the extraordinarily convoluted nature of some districts compels me to disclaim any implication that our preclearance establishes that

A letter from the Attorney General informing a jurisdiction it has failed to comply with § 5 cannot grant blanket immunity on that jurisdiction for any subsequent plan when more rational alternatives exist.<sup>7</sup> In this case, North Carolina could have drawn more compact and contiguous districts that complied with the Voting Rights Act, but refused to do so because it would hurt incumbents. In effect, North Carolina made incumbency superior to the Act, a result not sanctioned by the law.

# III. THE DISTRICT COURT ERRED IN RELYING ON UNITED JEWISH ORGANIZATIONS, INC. V. CAREY TO JUSTIFY NORTH CAROLINA'S CONGRESSIONAL DISTRICTS.

The district court concluded that this Court's opinion in United Jewish Organizations v. Carey, 430 U.S. 144 (1977) ("U.J.O.") supports the right of the North Carolina General Assembly to make racially conscious redistricting decisions as long as the General Assembly was attempting "to meet the broad remedial requirements of the Voting Rights Act." J.S. App. A at 19a.

the proposed plan is otherwise lawful or constitutional. I understand that litigation challenging the legal and constitutional propriety of various districts is pending. *Terrazas* v. *Slagle*, [789 F. Supp. 828 (W.D. Tex. 1991), *aff'd*, 113 S. Ct. 29 (1992)]. Our preclearance of the submitted redistricting plan in no way addresses the state's approach to its redistricting obligations other than with regard to Section 5.

#### Dunne letter at 2.

<sup>7</sup> Even the February 6, 1992 letter from Assistant Attorney General Dunne preclearing the challenged plan cannot be read to give the plan an imprimatur, since the letter included a standard disclaimer: "We note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin enforcement of the changes." Preclearance letter of John Dunne, Feb. 6, 1992, reproduced in *Pope v. Blue*, J.S. App. D at 146a.

In U.J.O., a New York City Hasidic Jewish community, which had previously been located entirely in one state assembly district and one senate district, was split between two assembly and two senate districts, in order to create substantial nonwhite majorities in these districts. The Jewish community's challenge to this plan failed when this Court determined that the use of racial criteria by the state of New York in its attempt to comply with § 5 of the Voting Rights Act and to secure the approval of the Attorney General did not violate the Fourteenth Amendment. A plurality of this Court concluded that:

Implicit in Beer [v. United States, 425 U.S. 130 (1976)] and City of Richmond [v. United States, 422 U.S. 358 (1975)], then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5....Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any  $p \cdot r$  se rule against using racial factors in districting and apportionment.

\*\*\*\*

Unless we adopted an unconstitutional construction of §5 in *Beer* and *City of Richmond*, a reapportionment cannot violate the Fourteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts.

U.J.O., 430 U.S. at 161-162.

While U.J.O. was decided well before the 1982 congressional disclaimer against proportional representation, its holding allows a finding for the appellants in this case while leaving Beer, City of Richmond, U.J.O. and the Voting Rights Act intact.

In his dissent below, District Judge Voorhees argued that the majority in *Shaw* "has overstated the premise set forth by the *U.J.O.* plurality." J.S. App. A at 36a. Indeed, *U.J.O* in no way

creates an absolute defense based on a state legislature's intended, or proclaimed, compliance with the Voting Rights Act. J.S. at 39a. *Amicus* Republican National Committee agrees.

Implicit in the language from U.J.O. set out above rejecting a "per se rule ... merely" because a state engages in race-conscious redistricting is an acknowledgment that additional factors could yield a different result. The U.J.O. plurality set out several of those factors:

[We] think it is also [constitutionally] permissible for a State, employing sound redistricting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

U.J.O., 430 U.S. at 168 (emphasis added.).

Only the most self-interested incumbents could argue that the North Carolina General Assembly employed "sound redistricting principles" to construct the challenged congressional districts. The districts are, admittedly, of virtually equal population. But that alone should not insulate this plan from attack. As this Court noted in Karcher v. Daggett: "[B]eyond requiring States to justify population deviations with explicit, precise reasons, which might be expected to have some inhibitory effect, Kirkpatrick [v. Preisler, 394 U.S. 526 (1969), requiring a good-faith effort to achieve absolute equality in congressional districts] does little to prevent what is known as gerrymandering."

462 U.S. at 734 n.6. In fact, "the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort." *Id.* at 752 (Stevens, J., concurring), quoting *Wells* v. *Rockefeller*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting); see also Karcher, 462 U.S. at 776 (White, J., dissenting).

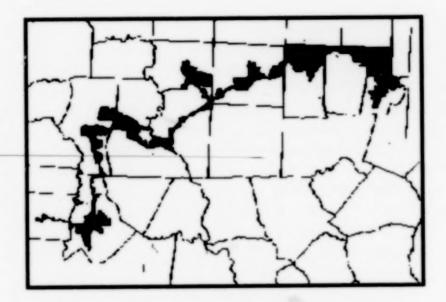
North Carolina's congressional redistricting plan is gerrymandering of the worst sort. The districts substantially diverge from reasonable standards of compactness and contiguity and arbitrarily ignore long-established communities of interest. The boundaries of many of the districts twist and wind their way across the map of the state in an arbitrary and illogical manner.

These contorted districts are the rule, not the exception, in North Carolina's congressional redistricting plan. Perhaps the most grossly contorted district in the nation is the twelfth congressional district, which serves as the linchpin to the General Assembly's redistricting plan. The twelfth district is one of two districts which the appellees maintain were designed to give black voters an opportunity to elect candidates of their choice, since blacks comprise a 56 percent majority of the population in that district. 10

<sup>&</sup>lt;sup>8</sup> North Carolina's computer-assisted redistricting was, in fact, a model of equal population. Seven of the twelve districts were constructed with exactly the ideal population of 552,386 while five districts had populations of 552,387. It is the understanding of *amicus* Republican National Committee that appellants will lodge relevant 1990 census data that sets out the populations of these districts.

<sup>&</sup>lt;sup>9</sup> The amicus Republican National Committee is informed that the appellants will lodge historical examples of congressional redistricting in North Carolina with the Clerk of this Court.

<sup>10</sup> The first and twelfth districts did, in fact, elect black Members of Congress in 1992, Eva M. Clayton in the first and Melvin L. Watt in the twelfth. The remaining ten districts all reelected the incumbents. CAPITOL DIRECTORY, Donnald K. Anderson, Clerk of the House of Representatives (Jan. 3, 1993).



North Carolina's Twelfth Congressional District

The twelfth district is approximately 160 miles long and winds through Alamance, Davidson, Durham, Forsyth, Gaston, Guilford, Iredell, Mecklenburg, Orange and Rowan Counties. For much of its length, the district is no wider than the Interstate Highway 85 ("I-85") corridor. In Davidson County, northbound drivers on I-85 would be in the twelfth congressional district, while southbound drivers would be in the sixth district. In neighboring Guilford County, the districts would "change lanes" with southbound drivers finding themselves in the Twelfth District and northbound drivers in the Sixth District. J.S. App. A at 4a-5a.

In Gaston County, the twelfth district is contiguous only because it runs along a railroad right-of-way created between railroad's tracks and a highway. In Iredell County, the twelfth district intersects at a single "point" with two other districts, at which point the twelfth district "crosses over" the other two districts and is "contiguous" only by a "point" which it shares in common with the two other districts. The twelfth district, like others in the plan, completely diverges from any rational standard of compactness, contiguity or communities of interest.

The manner in which the General Assembly drew the plan had the result of splitting numerous communities into different congressional districts. A total of 44 counties were split into two or more congressional districts, and a total of seven counties split into three or more congressional districts. See J.S. App. A at 5a. For example, portions of five counties in the Twelfth District -- Forsyth, Guilford, Iredell, Mecklenburg and Rowan -- were split into three separate congressional districts. Similarly, the Town of Davidson and the City of Charlotte have been split into three separate congressional districts.

The General Assembly even elected to split 50 precincts along the I-85 corridor into at least two different congressional districts. *Id.* These examples are but a few of the numerous irrational configurations embodied in the plan.

North Carolina's congressional redistricting plan ignores virtually all "sound districting principles." On the contrary, the plan defies common sense and any concept of rational policy. A 1992 editorial in the Wall Street Journal (F. b. 4, 1992) refers to the plan as "Political Pornography." But even more important for the issues in this appeal are the perceptions of local observers throughout the state of the extent to which the plan is a crazy quilt without rationality. An editorial in the Raleigh News and Observer (Jan. 13, 1992) said that it "plays hell with common sense and community." Another editorial in the same newspaper (Jan. 21, 1992) concluded: "If a psychiatrist substituted North Carolina's proposed congressional redistricting maps for Rorschach inkblot tests, diagnoses of wackiness would jump dramatically. The maps ... don't make any sense -- to people who have any sense."

The General Assembly cannot reasonably maintain that the Voting Rights Act justifies the challenged districts, particularly where less onerous plans consistent with the Act were rejected. As noted by Judge Voorhees below, the General Assembly ignored

<sup>11</sup> Pope, J.S. App. D at 168a.

<sup>12</sup> Pope, J.S. App. D at 178a.

<sup>13</sup> Pope, J.S. App. D at 159a.

"the proposals of the Attorney General, the North Carolina Republican Party, and some number of nonpartisan groups." J.S. App. A at 43a.

Nothing in this Court's ruling in U.J.O., nor in the Voting Rights Act, sanctions such cartographic lunacy.

IV. THE GENERAL ASSEMBLY'S PRETEXTUAL USE OF THE VOTING RIGHTS ACT TO JUSTIFY THE CHALLENGED DISTRICTS IS CONTRARY TO THIS COURT'S REQUIREMENT OF GEOGRAPHIC COMPACTNESS IN THORNBURG V. GINGLES.

This Court's ruling in Thornburg v. Gingles, 478 U.S. 30 (1986) has been called the "pole star of the law in the [voting rights] area, "14 and, as such, it contains at least one key standard that the North Carolina General Assembly ignored in using the Voting Rights Act as the justification for the challenged district configurations: geographic compactness. In Gingles, the Court set out the "necessary preconditions" to prove that multimember districts impair minority voters' ability to elect representatives of their choice. Among them were a requirement of geographic compactness: First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.

Gingles, 478 U.S. at 50-51 (emphasis added). While this Court did not specifically define "geographic compactness" in Gingles, North

Carolina congressional district 1 and 12 cannot meet any common sense definition of compactness.

Similarly, in East Jefferson Coalition v. Jefferson Parish, 691 F. Supp. 991 (E.D. La. 1988), the court determined that a "proposed district is sufficiently compact if it retains a natural sense of community. To retain that sense of community, a district should not be so convoluted that its representative could not easily tell who actually lives within the district." Id. at 1007. The court rejected plaintiff's plan which "stretches along the river and reaches around the airport to include a concentration of black residents living above the airport." Id. The court refused to accept a plan "which contains a district which is drawn with the acknowledged intent to include minorities, but which does not meet the minimal requirements of reapportionment." Id.

By contrast, the court in *Dillard* v. *Baldw.n County Bd. of Educ.*, 686 F. Supp. 1459 (M.D. Ala. 1088) rejected an argument that a proposed district was unacceptable because it was "too elongated and curvaceous and thus fail[ed] to meet the requirement of 'compactness.'" The court rejected the argument noting that:

By compactness, [Gingles] does not mean that a proposed district must meet, or attempt to meet, some aesthetic absolute, such as symmetry or attractiveness. An aesthetic norm, by itself, would be not only unrelated to the legal and social issues presented under §2, it would be an unworkable concept, resulting in arbitrary and capricious results, because it offers no guidance as to when it is met. It is apparent from the [Gingles] opinion that compactness is a relative term tied to certain practical objectives under §2; the requirement is not that a district be compact, but that it be "sufficiently" compact under §2.

<sup>&</sup>lt;sup>14</sup> Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989), aff'd 111 S. Ct. 662(1991).

The issue of the applicability of the Gingles preconditions to single-member districting plans like the one at issue is currently before the Court in several contexts, including Voinovich v. Quilter, 794 F. Supp. 695, 794 F. Supp. 756 (N.D. Ohio 1992), appeal pending, No. 91-1618 and Emison v. Growe, 782 F. Supp. 427 (D. Minn. 1992), appeal pending as Growe v. Emison, No. 91-1420.

<sup>&</sup>lt;sup>16</sup> See, infra, at 28 for Professor Grofman's characterization of this as a standard of "cognizability."

Id. at 1465-66.

While this approach may be consistent with a "functional' view of the political process," under § 2, SENATE COMM. ON THE JUDICIARY, REPORT ON THE VOTING RIGHTS ACT EXTENSION, S. REP. No. 417, 97th Cong., 2d Sess., AT 29, 30 n.120 (1982), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, its outer limits have been reached in North Carolina. 17

# V. NEUTRAL, TIME-HONORED REDISTRICTING PRINCIPLES EXIST, AND ARE RELEVANT ELEMENTS OF THE CHALLENGED PLAN'S DISCRIMINATORY INTENT AND EFFECT.

#### A. The Court Should Take a Unified, Consistent Approach to Redistricting Standards

In his dissenting opinion below, Judge Voorhees detailed several of the "sound redistricting principles" contemplated by this Court in U.J.O.:

Time-honored, constitutional concepts of districting, such as contiguity, compactness, communities of interest, residential patterns, and population equality, have maintained their obligatory effect and precedential value as deterrents against equal protection encroachments by way of reapportionment based exclusively on racial criteria.

#### J.S. App. A at 40a (emphasis added).

Amicus Republican National Committee suggests that the Voting Rights Act neither contemplates nor demands purely race-conscious districting that fails to consider, where practicable, neutral redistricting principles and criteria.

Indeed, this case illustrates the need to adopt these neutral criteria, not only in the context of the Voting Rights Act, but in all redistricting contexts, because "[there] is only one Equal Protection Clause. [The] Clause does not make some groups of citizens more equal than others." *Karcher*, 462 U.S. at 749 (Stevens, J., concurring).

In his concurring opinion in Garza v. County of Los Angeles, 918 F.2d 763 (9th cir. 1990), cert. denied, 111 S. Ct. 681 (1991), Judge Kozinski noted that "[the] Supreme Court in Davis v. Bandemer, 478 U.S. 109 (1986), left open whether and under what circumstances political gerrymandering may amount to a violation of the Voting Rights Act. Id. at 118 n. 8." Garza, 918 F.2d at 779 (Kozinski, J., concurring). In Garza, the Los Angeles County Board of Supervisors was found "to have acted primarily on the political instinct of self-preservation." Id. at 771. The Ninth Circuit noted that in choosing fragmenta ion of the Hispanic voting population as the avenue by which to achieve this selfpreservation, "[the] Supervisors intended to create the very discriminatory result that occurred. That intent was coupled with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful." Id., citing Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).18

Likewise, the desire for incumbency protection, whether based on racial or political animus, led to the discriminatory districting challenged here. This confluence of political motive and discriminatory racial effect is an evident and continuing part of our system, and suggests that political and racial gerrymanders should be subject to similar analysis in order to achieve consistent, fair and effective representation for all citizens.<sup>19</sup>

<sup>17</sup> It may be that a different standard should apply for plans enacted remedially as compared to plans enacted in the manner challenged here.

<sup>&</sup>lt;sup>18</sup> Accord, Republican Party of North Carolina v. Martin, No 91-1741 (slip op. at 19) (4th Cir. Nov. 24, 1992) (LEXIS 30968).

<sup>&</sup>lt;sup>19</sup> While the special characteristics of partisan as opposed to racial gerrymandering -- e.g. the mutability of partisan affiliation -- may allow for differing threshold effects showings, "there is a direct connection between the test for racial vote dilution enunciated in *Thornburg* v.

There is no significant difference between a partisan gerrymander which has racial effects, and a racial gerrymander such as this one where race is the surrogate used to achieve the political goal of incumbency protection.<sup>20</sup>

"[District] representation is a zero-sum game. Explicit favoring of one subgroup adversely affects another group (and the political party with which it is aligned)." R. Dixon, Fair Criteria and Procedures for Establishing Legislative Districts, in REPRESENTATION AND REDISTRICTING ISSUES at 9 (B. Grofman, et al., eds. 1982). In order to arrive at this zero sum, both sides of the equation -- racial and political -- must be analyzed analogously, if not equally. Toward that end, amicus Republican National Committee suggests the following criteria as applicable in both contexts.

#### B. Districts Drawn in Furtherance of the Goals of the Voting Rights Act Should Recognize Legitimate Communities of Interest.

A state's congressional districts should not be distorted because the Voting Rights Act, in order to fulfill its goal of

Gingles and that for partisan gerrymandering enunciated in Davis v. Bandemer. That connection draws on the parallels between the predictability of partisan voting patterns on the one hand, and the predictability of levels of racial bloc voting on the other." B. Grofman, Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg," in POLITICAL GERRYMANDERING AND THE COURTS 31 (B. Grofman, ed., 1990).

To argue otherwise would be to sanction the anomalous result suggested by counsel for appellees in the recent oral argument before this Court in Voinovich v. Quilter, No. 91-1618. Counsel for the appellees argued that absent a racial animus in a political gerrymander, "my view is that whites and blacks may not be treated alike because section 2 forbids that." Transcript of Proceedings before the Supreme Court, Voinovich v. Quilter, No. 91-1618 (Dec. 8, 1992) at 30. Such logic implies that it is permissible for Republicans to be gerrymandered by Democrats, but not the converse, since most blacks are Democrats and protected by the Voting Rights Act.

providing minorities an "equal opportunity to elect candidates of their choice," requires incumbents' districts to be altered. Inherent in the Voting Rights Act's goal is an understanding that any electoral choice is made by electors who share some common interests. The Voting Rights Act does not sanction the mutilation of such common interests merely to protect incumbents.

In fact, communities of interest have been a touchstone of our representational system since the Founders established it. As James Madison noted when discussing the House of Representatives: "Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests in either, which will not be within the knowledge of the representative of the district." *The Federalist* No. 56 at 351 (J. Madison) (Henry Cabot Lodge ed. 1892). He further described why states needed more than one representative:

It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents... Were the interests and affairs of each individual State perfectly simple and uniform, a knowledge of them in part would involve a knowledge of them in every other, and the whole State might be completely represented by a single member taken from any part of it.

Id. Madison believed representatives so selected would bring with them "a local knowledge of their respective districts." Id. at 352.

Communities of interest can be identified and manageably quantified by many different components. Racial, ethnic, and religious characteristices often are dominant interests, but other factors -- such as urban/rural/suburban nature of the community, geography or income -- are also important and can be overriding. Numerous federal and state courts have found this to be a workable yardstick for analyzing districts.<sup>21</sup> Other courts have also found

<sup>&</sup>lt;sup>21</sup> For example, Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982) described communities of interest as areas which "share common

one or more common interests to be defining characteristics of a community.<sup>22</sup>

## C. Compactness Is A Fundamental Principle of Sound Redistricting.

North Carolina's congressional districts are "tortured," even by the admission of the majority below. J.S. App. A at 5a. While amicus resists stating its argument in terms of compactness qua compactness, the bizarrely shaped districts embodied in the plan warrant further attention. Such analysis is justified by this Court's jurisprudence.

concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade." *Id.* at 91.

See also Legislature of State of California v. Reinecke, 10 Cal. 3rd 396, 110 Cal. Rptr. 718, 516 P.2d 6 (Cal. Sup. 1973) which defined "community of interests" as "the social and economic interests common to the population of an area which are probable suspects of legislative action [which] . . . should be considered in determining whether the area should be included within or excluded from a proposed district in order that all of the citizens of the district might be represented reasonably, fairly and effectively." Id. at 412.

Lacomb v. Growe, 541 F. Supp. 160 (D. Minn. 1982) (urban-suburban-rural distinction recognized by court attempt to separate interests as well as one person, one vote standard would allow); Goddard v. Babbit, 536 F. Supp. 538 (D. Ariz. 1982) (Indian reservation recognized as community of interest which should not be divided by district line in court-drawn plan); O'Sullivan v. Brier, 540 F. Supp. 1200 (D. Kan. 1982) (metropolitan areas constitute socio economic communities of interest as do agriculturally-oriented rural areas); S.C. State Conference of Branches, Etc. v. Riley, 533 F. Supp. 1178, 1181 (S.C. 1982) (even though plan splits one county, split maintains Charleston metropolitan community of interest and places remainder of the split county in a district which shares similar interests); Arizonans for Fair Representation v. Symington, No. Civ. 92-256-PHX-SMM (D. Ariz. May 5, 1992) (court's plan sought to avoid dividing any Indian reservation or placing tribes with antagonistic interests together, while keeping suburban and urban neighborhoods with similar interests).

While Justice Stevens warned in Karcher "against defining gerrymandering in terms of odd shapes," 462 U.S. at 755 n.15 (Stevens, J. concurring), it should be recognized that dramatic "departures from compactness are a signal that something may be amiss." *Id.* at 758.<sup>23</sup> Something is indeed amiss in North Carolina, and appellants have been precluded from making their case to remedy this problem.

In Reynolds v. Sims, 377 U.S. 533 (1964), this Court invalidated the Alabama legislative plan not only because of excessive population deviations, but also because "the existing apportionment ... presented little more than crazyquilts, completely lacking in rationality, and could be found invalid on that basis alone." Id. at 568 (emphasis added).

In Davis v. Bandemer, this Count did not reject the district court's "findings as to ... the contours of particular districts." 478 U.S. at 142 n.20. Rather, the Court determined that "none of the facts found by the District Court were relevant to the question of discriminatory effects." Id. While the Court determined that the validity of district configurations "was an issue we did not need to consider," id at 142, the Court's ruling does appear to preclude such an analysis in the context of this case where appellants tie those configurations to arbitrary and irrational effects. At the very least, Bandemer suggests that evidence of invalid configuration is relevant "to whether the districting plan met legitimate state interests." Id.

Relative compactness is a manageable standard, and this and other courts have successfully used considerations of

<sup>&</sup>lt;sup>23</sup> See also R. Dixon, Democratic Representation: Reapportionment in Law and Politics 460 (1968); B. Grofman, Criteria for Districting 12, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES (B. Grofman & A. Lijphart, eds. 1985); Grofman, An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering, 21 STETSON L. REV. 783 (1992).

compactness, contiguity and jurisdictional splits as criteria in the construction and assessment of plans. Connor v. Finch, 431 U.S. 407 (1977) noted that plans drawn by a court, in either a deadlock or remedial situation, should minimize deviations and minority vote dilution, as well as be contiguous and compact. Numerous federal district courts have followed this suggestion.<sup>24</sup>

It is not necessary to rely on Justice Stewart's classic definition of obscenity, "I know it when I see it," Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), to measure whether the North Carolina districts are compact or illegitimately contoured shapes are designed solely to protect incumbents. Meaningful measures of compactness do exist,<sup>25</sup> and can be applied by the district courts in a manageable manner.

#### D. The North Carolina General Assembly Arbitrarily and Capriciously Ignored Fundamental Notions of Contiguity In Constructing the Challenged Congressional Districts.

This Court characterized the constitutional claim of the Baker v. Carr plaintiffs as being "that the [challenged] statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of [any standard of apportionment]." Baker, 369 U.S. at 207. As Justice Clark put it, the plan was "a crazy quilt without rational basis." Id. at 254 (Clark, J., concurring).

North Carolina's congressional redistricting suffers an even more fatal flaw under this standard -- the districts are not contiguous. This is not defensible under any notion of racial equity since a standard of contiguity is a sine qua non for fair and effective representation. In virtually all redistricting plans, contiguity is assumed, and a plan that does not comport with this fundamental standard can serve no rational or legitimate justification, particularly in light of the advances in computer technology that have occurred in recent years. The Court explicitly recognized this in Karcher when it noted that "the rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the state has." Id. at 733 (emphasis added). Here, however, the North Carolina General Assembly perverted the concept of contiguity and used computer technology to draw noncontiguous maps, apparently the only way to save incumbents. 26

Niemi, Grofman & Carlucci, Measuring the Compactness and the Role of a Compactness Standard in a Test for Partisan Gerrymandering, 52 J. Pol. 1155-81 (1990). No single definition of compactness can be applied in all cases, since each state's geographic characteristics may preclude one or more applications. However, given the variety of accepted methods of analysis, a district court can determine the most applicable method.

<sup>&</sup>lt;sup>24</sup> See, e.g. De Grandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992);
Arizonans for Fair Representation v. Symington, No. Civ. 92-256-PHX-SMM (D. Ariz. May 5, 1992) (slip opinion at 11); Carstens v. Lamm, 543 F. Supp. 68, 87-88 (D. Colo. 1982); LaComb v. Growe, 541 F. Supp. 145, 148 (D. Minn. 1982); South Carolina State Conf. of Branches v. Riley, 533 F. Supp. 1178, 1180-81 (D. S.C. 1982); Lacomb v. Growe, 541 F. Supp. 145 (D. Minn. 1982) and Shayer v. Kirkpatrick, 541 F. Supp. 922 (W.D. Mo. 1982).

<sup>25</sup> Depending on the configuration of the district, and the geography of the state in which it is located, compactness can be measured by: summing the length of aggregate boundaries, B. Adams, A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation, 19 HARV. J. ON LEGIS. 825 (1977); computing the absolute value of the difference between the length and width of the district, L. Eig and M. Seitzinger, State Constitutional and Statutory Provisions Covering Congressional and State Legislative Redistricting, Cong. Research Serv. 55 (1981) (citing IOWA CODE § 42.4 (b)); calculating the ratio of the area of a district to the area of smallest possible circumscribing circle, Reock, Measuring Compactness as a Requirement of Legislative Apportionment, 5 MIDWEST J. OF POL. SCI. 70 (1971), or by a combination of these and other methods, Polsby & Popper, op. cit. at 339-353. Some recent analyses have turned from a geographic analysis to a functional, population-oriented determination. See, e.g., Hofeller & Grofman, Comparing Compactness of California Congressional Districts Under Three Different Plans in B. Grofman (ed), POLITICAL GERRYMANDERING AND THE COURTS (1990); Hofeller,

<sup>26</sup> One definition of contiguity is found in Polsby & Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan

Since contiguity is normally assumed in redistricting and is generally noncontroversial,<sup>27</sup> the lack of contiguity should signal that something is amiss. Several district courts have recognized the issue and invalidated plans which were, among other things, not contiguous.<sup>28</sup>

The need for contiguity in congressional districts should be self-evident, since Members of Congress are required to be elected by single-member districts. 2 U.S.C. §2c (1967). If a two- or three-part noncontiguous district is constitutionally permissible, what would limit the North Carolina General Assembly from constructing, for illegitimate purposes, congressional districts composed of 10, 50 or even 100 pieces of noncontiguous geography? Surely our system of representative government cannot countenance such a result.<sup>29</sup>

Gerrymandering, 9 YALE L. & POL. REV. 301, 330 n. 139 (1991): "The technical definition of contiguity is satisfied when one can travel from one part of a district to any other without having to leave the district." Even if there is contiguity by "point" in the challenged plan -- although a visual analysis suggests that this is by no means certain -- each such point would be in at least two districts at the same time.

<sup>27</sup> B. Grofman, Criteria for Districting: A Social Science Perspective, 33 U.C.L.A. L. REV. 77, 84 (1985); R. Niemi, The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering, 33 U.C.L.A. L. REV. 185, 187 (1985).

<sup>28</sup> In Winter v. Docking, 356 F. Supp. 88 (D. Kan. 1973), a three-judge federal district court invalidated a Kansas legislative district plan because it found the plan "was based primarily upon the desire to eliminate the necessity of any incumbent members of the House, particularly majority party members, to seek reelection against one another." Id. at 91. In so doing, "many of the newly created districts were lacking in compactness and contiguity." Id. See also Wendler v. Stone, 350 F. Supp. 838, 843 (S.D. Fla. 1972) (Roettger, J. dissenting).

29 Two experts have recently commented on the importance of contiguity in this context:

E. The Geographic Nature of Our Representational System is Thwarted by Districting Which Ignores Compactness, Contiguity and Communities of Interest.

The geographic basis of representation in the House of Representatives is founded on the notion that representatives should be linked in some significant way to the interests of the community they represent. This close affinity between the representative and the represented was central to the Founders' intent in creating the House of Representatives:

As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people.

The Federalist No. 52 at 329 (J. Madison or A. Hamilton) (Henry Cabot Lodge ed. 1892).

A representative elected from districts like those in question is neither immediately dependent upon nor in intimate sympathy with the voters, for the diversity of interests and communities within these districts makes such intimacy problematic.

Despite the courts' inattention, contiguity is not just a gracenote in the score of democracy; it is crucial, both practically and theoretically. Without the restraint of contiguity, equinumerosity is so diminished that its only real value is symbolic. A contiguity requirement exponentially shrinks the number of available districting options, because in constructing one district, the mapmaker necessarily forecloses the possibility of constructing countless others which would intersect the first.

Polsby & Popper, op. cit., 330-31.

In the modern context, the nature of the affinity between the representative and the represented has been characterized by a leading voting rights expert as "cognizability."

The notion that representation should be based on geographically defined districts presumes that the link between a representative and his or her constituents is facilitated by candidates being able to campaign in geographically defined areas where door to door campaigning is possible and/or where access to constituents via media channels (e.g. newspapers and radio or TV stations) is made easier by the existence of common sources of information. Even more importantly, in geographically defined districts, the ability of voters to organize and mobilize on behalf of candidates and to collectively organize to influence their current representatives on behalf of policy changes is facilitated by the prospects for door to door organization and information campaigns conducted through the use of common media. Moreover, the 'cognizability' of district boundaries that comes when those boundaries can be clearly identified in terms of proximate geography facilitates voter identification of and with the district.

\*\*\*\*\*

By "cognizability" I refer to the ability of a legislator to define, in common sense terms, based on geographical referents, the characteristics of his or her geographic constituency. I should emphasize that, in my view, the appropriate test of cognizability is not whether the voters do know the boundaries of the district in which they reside, but whether those boundaries could, in principle, be explained to them in simple, common sense terms.

B. Grofman, Affidavit in Pope v. Blue, No. 91-2038, J.S. App. E at 182a-184a.

By any reasonable standard, North Carolina's congressional districts violate such a common sense standard. If these districts are allowed to stand, the House of Representatives,

the institution of our national government designed to be closest to the electorate, may cease to perform its intended constitutional function.

## CONCLUSION

North Carolina's tortured congressional districts are unconstitutionally discriminatory in intent and effect. Nothing in the Voting Rights Act, nor in the precedents of this Court, mandate or warrant these district configurations. For these reasons, the judgment of the United States District Court for the Eastern District of North Carolina should be reversed.

Respectfully submitted,

BENJAMIN L. GINSBERG
MICHAEL A. HESS\*
DALTON L. OLDHAM
310 First Street, S.E.
Washington, D.C. 20003
(202)863-8638
Counsel for Amicus Curiae
Republican National Committee

\*Counsel of Record January 21, 1993

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Supreme Court, U.S. F I L E D

FEB 2 2 1993

No. 92-357

OFFICE OF THE CLERK

# Supreme Court of the United States

OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Appellants

V.

WILLIAM BARR, et al.,

Appellees

Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF AMICI CURIAE ON BEHALF OF THE DEMOCRATIC NATIONAL COMMITTEE, DEMOCRATIC LEGISLATIVE LEADERS ASSOCIATION, DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, AND DEMOCRATIC GOVERNORS' ASSOCIATION IN SUPPORT OF THE APPELLEES

WAYNE R. ARDEN
JEFFREY M. WICE
Counsel of Record
430 South Capitol Street, S.E.
Washington, D.C. 20003
(202) 479-5161

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# Supreme Court of the United States

OCTOBER TERM, 1992

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BRIEF AMICI CURIAE ON BEHALF OF THE DEMOCRATIC NATIONAL COMMITTEE, DEMOCRATIC LEGISLATIVE LEADERS ASSOCIATION, DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, AND DEMOCRATIC GOVERNORS' ASSOCIATION IN SUPPORT OF THE APPELLEES

## INTEREST OF AMICI CURIAE

The amici consist of the Democratic National Committee and related Democratic Party organizations. All the amici have an interest in the issues presented in this case.

State legislators and Governors have the primary responsibility in the redistricting process. Any decision by this Court that impacts the redistricting process affects how legislators and Governors carry out their responsibilities. Members of Congress represent these districts and are directly affected by redistricting plans. Congress adopted the Voting Rights Act, 42 U.S.C. § 1973 (1982),

to ensure that the right to vote is not denied or abridged on account of race or color and it is of interest to the Congress that the Act is not weakened. The Democratic National Committee has an interest in ensuring that all citizens have a right to equally participate in the political process and that our legislative halls reflect the diversity of our society.

The amici urge this Court to affirm the decision of the district court. This Court has recognized that voting is a fundamental right. To provide that all Americans may freely exercise this right, the legally appropriate use of racial criteria in the districting process is essential. An affirmation would ensure the continued diversity in Congress and the State Legislatures. On the other hand, a reversal of the lower court's decision has the potential to significantly disrupt the political process. The validity of all majority minority districts would be placed in jeopardy.

Pursuant to Rule 37 of the Supreme Court of the United States, written consent of all the parties was requested for the filing of this brief as amici curiae. Written consent has been granted and the letters of consent have been filed with the Clerk.

### STATEMENT OF THE CASE

In the interest of brevity, the amici adopt the statement of the case set forth in the brief of the state appellees.

## SUMMARY OF ARGUMENT

1. A state legislature's pretextual intent to comply with the Voting Rights Act, 42 U.S.C. § 1973 (1982), and the Attorney General's preclearance under § 5 of the Act does not preclude a finding that a redistricting plan was adopted with an invidious discriminatory intent. Nevertheless, there is no evidence that the congressional redistricting plan adopted by the North Carolina General

Assembly evidenced invidious discriminatory intent. The plan fairly recognized minority voting strength and did not deny white voters an equal opportunity—on a statewide basis—to participate in the political process. In addition, North Carolina's use of racial criteria is benign and not inconsistent with this Court's recent pronouncements on the use of racial preferences.

- 2. North Carolina's creation of two congressional districts was pursuant to a legitimate state policy that sought to recognize African-American communities of interest without unduly disrupting existing congressional districts and their incumbents. Since legislatures are better situated to determine state policy, a court's review of such policy should be extremely limited. A court should look no further than to determine whether the proffered state policy is rational and whether the plan is in compliance with federal and state law.
- 3. Federal law does not require that congressional districting plans comply with any neutral criteria. Therefore, uncouth or irregularly shaped districts are not in and of themselves legally suspect. If a jurisdiction decides to recognize a community of interest, a court may not reject the jurisdiction's decision for failing to comply with some aesthetic norm.
- 4. The 1990 redistricting process led to enormous gains in the number of minority elected officials. However, the continued diversity of our Nation's legislatures is threatened by this pending claim. If the district court's decision is reversed the validity of countless minority districts will become suspect. The disruption to the political process would be enormous as numerous challenges to existing districts would be sure to follow.

#### ARGUMENT

I. ALTHOUGH A STATE LEGISLATURE'S PRE-TEXTUAL INTENT TO COMPLY WITH THE VOT-ING RIGHTS ACT AND THE ATTORNEY GEN-ERAL'S PRECLEARANCE UNDER § 5 DOES NOT PRECLUDE A FINDING THAT A REDISTRICTING PLAN WAS ADOPTED WITH AN INVIDIOUS DISCRIMINATORY INTENT, THE APPELLANTS CANNOT ESTABLISH SUCH AN INTENT.

This Court has directed the parties to address the following question:

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

61 U.S.L.W. 3418 (Dec. 7, 1992).

The language of the Voting Rights Act, 42 U.S.C. § 1973 (1982), and judicial precedent clearly indicate that a state legislature's pretextual intent to comply with the Voting Rights Act and the Attorney General's preclearance under § 5 of the Act does not preclude a finding that a redistricting plan was adopted with an invidious discriminatory intent. Nevertheless, the appellants cannot establish that the congressional redistricting plan adopted by the North Carolina General Assembly evidenced invidious discriminatory intent.<sup>1</sup>

When the Voting Rights Act was adopted in 1965 Congress was well aware that several states "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act." South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966). To avoid "massive resistance" through manipulation of State electoral laws, Congress required that "covered jurisdictions" submit and receive preclearance of any electoral change from either the United States District Court for the District of Columbia or the Attorney General of the United States.

A determination by the Attorney General to either reject or preclear an electoral change does not preclude further proceedings. If the Attorney General interposes an objection, a jurisdiction can seek a declaratory judgment in the District Court for the District of Columbia. See Beer v. United States, 425 U.S. 130 (1976); City of Petersburg v. United States, 410 U.S. 962 (1973), summarily aff'g, 354 F. Supp. 1021 (D.D.C. 1972). Alternatively, if the District Court grants a declaratory judgment or if the Attorney General declines to interpose an objection, private litigants are free to mount a de novo

Board intentionally used race to dilute the voting strength of African-American voters in violation of the Voting Rights Act and the Fifteenth Amendment.

<sup>&</sup>lt;sup>1</sup> Unlike the appellees in Quilter v. Voinovich, 794 F. Supp. 695, 794 F. Supp. 756, 794 F. Supp. 760 (N.D. Ohio 1992), appeal pending, sub nom. Voinovich v. Quilter, No. 91-1618, the Shaw appellants did not allege that the legislature's intent to comply with the Voting Rights Act was pretextual or violated § 2 of the Act. In addition, in Voinovich, the district court found that the Ohio Apportionment

<sup>&</sup>lt;sup>2</sup> Jurisdictions covered under § 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b) (1982), and therefore subject to the preclearance requirements of § 5 were: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia and 40 counties in North Carolina. 30 Fed. Reg. 9897 (1965). Subsequent amendments to the Act resulted in the coverage of additional jurisdictions: Alaska, Arizona, Texas and several counties or towns in California, Florida, Michigan, New Hampshire, New York and South Dakota. 28 C.F.R. 51.67 (1987).

attack upon an electoral change. Section 5 of the Voting Rights Act provides:

Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure.

42 U.S.C. § 1973c (1982). This language clearly indicates that Congress did not intend to preclude a finding that a redistricting plan was adopted with an invidious discriminatory intent if the plan was precleared by the Attorney General.

In Major v. Treen, 574 F. Supp. 325 (E.D.La. 1983), a three-judge district court invalidated a congressional redistricting plan previously precleared by the Attorney General. The plaintiffs alleged that the congressional plan had a discriminatory effect on African-Americans in violation of amended § 2 of the Voting Rights Act and was intentionally designed to minimize and dilute minority voting strength in violation of the Fourteenth and Fifteenth Amendments to the Constitution. Id. at 327. The court held that the plan violated amended § 2 of the Voting Rights Act but declined to rule on the intentional discrimination claim.3 However, the court did note some evidence in support of the contention that the plan was adopted with a racially discriminatory purpose—the opposition of the Governor to the creation of a majority African-American congressional district. The court explained that the Governor's concerns:

were restricted to the aggregation of blacks within one district; the coalescence of whites was not regarded as ominous so long as Congressman Livingston's chances for re-election were maximized. An Orleans-based district with a 55% black population was not acceptable to the Governor. As later noted, an Orleans-based district with a 55% white population encountered no objection.

Id. at 333. See also Morris v. Gressette, 432 U.S. 491, 506-507 (1977) ("where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation").

A. Congress Did Not Authorize The Attorney General To Recommend Redistricting Plans; Therefore The Failure Of North Carolina To Adhere To A Plan Referenced By The Attorney General Has No Relevance To A Finding Of Discriminatory Intent.

Section 5 provides for the submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c (1982). "The Attorney General does not act as a court in approving or disproving the state legislation. . . The provision for submission to the Attorney General merely gives the covered State a rapid method of rendering a new state election law enforceable." Allen v. State Board of Elections, 393 U.S. 544, 549 (1969). The Attorney General's role is limited to determining whether a submitted plan is free of discriminatory purpose or effect. 28 C.F.R. 51.52 (1987).

Congress has not authorized and the Attorney General does not recommend redistricting plans to covered jurisdictions during the submission process. However, the Attorney General does seek to determine the extent to which the jurisdiction afforded members of racial and language

<sup>&</sup>lt;sup>3</sup> The court explained that "given our conclusion that Act 20 results in a dilution of black voting strength, we need not draw the ultimate inference of purposeful discrimination from the composite of factors heretofore outlined. The court has nevertheless taken into account, as but one aspect of the totality of circumstances, the evidence that opposition to the creation of majority black districts was responsible, to a significant extent, for the defeat of the Nunez Plan and the substitution of Act 20." Major, 574 F. Supp. at 355 n.39.

minority groups an opportunity to participate in the decision making process. 28 C.F.R. 51.57 (1987). In determining the extent of minority participation the Attorney General reviews alternative plans that were presented to the legislature for consideration and the legislature's reason for rejecting these alternatives. However, the Attorney General cannot actually recommend a specific plan. Therefore, the failure of North Carolina to adhere to a plan referenced by the Attorney General has no relevance to a finding of discriminatory intent.

## B. North Carolina's Congressional Redistricting Plan Is Not Invidiously Discriminatory.

Forty North Carolina counties are subject to § 5 of the Voting Rights Act, 28 C.F.R. 51 (1987). Therefore, North Carolina is required to obtain preclearance of any statewide redistricting plan before the plan may be implemented. Under § 5, North Carolina has the burden to establish that an electoral change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1982). It was with the intent to comply with § 5 that North Carolina adopted a congressional redistricting plan with two majority African-American districts.<sup>5</sup>

There is no allegation by African-American or other minority voters that the congressional redistricting plan adopted by North Carolina was the product of invidious discrimination. The challenge to the plan was filed by white voters who allege that the creation of the two African-American districts is discriminatory. However, the appellants can point to no authority that supports their claim that the redistricting plan was a product of invidious discrimination.

As correctly noted by the district court, the appellants cannot establish the requisite intent for equal protection and Fifteenth Amendment purposes—"a legislative intent to deprive white voters, including plaintiffs, of an equal opportunity with all other racial groups of voters—on a statewide basis—to participate in the political process and to elect candidates of their choice." J.S. App. A at 23a. The appellants could not prove "that creation of the two 'grotesque' black-majority districts . . . has operated to fence out the white population of the state, or either of the two challenged districts, from participation in the political processes of the state or districts, nor to minimize or unfairly cancel out white voting strength." J.S. App. A at 23a. Moreover, "the plan will not lead to proportional

<sup>&</sup>lt;sup>4</sup> The power of the Attorney General to recommend specific redistricting plans would raise serious constitutional concerns. The Attorney General would be acting as a super-legislature with no obligation to adhere to state interests and with more authority than this Court has provided the federal courts when remedying constitutional violations. See Upham v. Seamon, 456 U.S. 37 (1982).

The appellants contend that the proviso in § 2 of the Voting Rights Act "(t) hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population," 42 U.S.C. § 1973 (1982), prevents North Carolina from creating two majority African-American districts. However, Congress adopted this proviso out of a concern that amended § 2 would be interpreted as a guarantee of proportional representation for minority voters. S. Rep. No. 417, 97th Cong.,

<sup>2</sup>d Sess. 30-31 (1982). Although the Act does not insure proportional representation, neither the Act nor this proviso limits the number of majority minority districts a jurisdiction may affirmatively create. As discussed *infra*., a jurisdiction's decision to create majority minority districts is constrained only by the Constitution, the Voting Rights Act and state law. The issue of whether the unnecessary creation of majority minority districts violates the Constitution and the Voting Rights Act through the packing and fragmenting of minority populations is pending before this Court. Voinovich v. Quilter, appeal pending, No. 91-1618.

<sup>&</sup>lt;sup>6</sup> In the November, 1992 elections, held under the challenged plan, two African-Americans, Eva M. Clayton and Melvin L. Watt, were elected to Congress, becoming the first African-Americans elected to Congress from North Carolina since 1898. B. Ragsdale & J. Treese, Black Americans in Congress, 1870-1989 (1990).

underrepresentation of white voters on a statewide basis." J.S. App. A at 24a.

The only injury claimed by the appellants is that the African-American majority in the First and Twelfth congressional districts may elect a different representative than white voters, if the latter were in the majority. However, this Court has held that "the mere fact that one interest group or another concerned with the outcome of . . . elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political process." Whitcomb v. Chavis, 403 U.S. 124, 154-155 (1971).

In addition, the appellants cannot establish that the North Carolina redistricting plan violated their rights to equal protection. In Rogers v. Lodge, 458 U.S. 613 (1982), this Court affirmed a finding that African-American voters had established that elections in Burke County, Georgia, diluted their voting strength in violation of the Fourteenth and Fifteenth Amendments to the Constitution. The Court considered several factors to be relevant in determining that the challenged electoral system intentionally discriminated against African-American voters: the impact of past discrimination on the ability of blacks to participate effectively in the political process; evidence of exclusion of blacks from the political process; the unresponsiveness and insensitivity of white elected officials to the needs of the black community and the depressed socio-economic status of blacks. Id. 458 U.S. at 624-626.

These factors should also be relevant to a claim by white voters that an electoral system violates their Four-

teenth Amendment rights. See Regents of the University of California v. Bakke, 438 U.S. 265, 289-290 (1978) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal"). Since appellants cannot prove that the majority white North Carolina General Assembly intentionally discriminated against white voters, that white voters have been excluded from the political process or that white elected officials have been unresponsive or insensitive to their needs, appellants cannot succeed on their "reverse discrimination" claim."

# 1. United Jewish Organizations Establishes That Compliance With § 5 Necessitates the Use of Racial Considerations in Drawing District Lines.

The district court's decision is consistent with this Court's jurisprudence. It is well established that a legislative body may consider race in drawing district lines, so long as it does not discriminate invidiously, have a discriminatory effect on minority voters or contravene the one person, one vote standard. See Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (". . . a state may employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation"). The Constitution does not prevent a jurisdiction from deliberately creating or preserving African-American majorities in particular dis-

<sup>&</sup>lt;sup>7</sup> The 1992 election results support this finding. Although whites comprise 75% of North Carolina's population, white candidates won 10 of 12 congressional districts and 144 of 170 state legislative districts.

<sup>\*</sup>This Court's precedent on minority vote dilution claims under the Fourteenth and Fifteenth Amendments would seem to preclude the ability of white voters to establish the necessary elements to succeed on a constitutional vote dilution claim as white voters. City of Mobile v. Bolden, 446 U.S. 55 (1980). However, this Court's decision in Davis v. Bandemer, 478 U.S. 109 (1986), leaves open the possibility that white voters, as members of a political party, could succeed on an equal protection claim alleging partisan discrimination.

tricts to comply with the requirements of § 5. See United Jewish Organizations v. Carey, 430 U.S. 144, 161 (1977); Beer v. United States, supra.

In United Jewish Organizations, white voters challenged the use of racial criteria by the State of New York in its attempt to comply with § 5 of the Voting Rights Act and to secure the approval of the Attorney General. The district court dismissed the complaint reasoning that the redistricting did not disenfranchise petitioners and that racial considerations were permissible to correct past discrimination. United Jewish Organizations v. Wilson, 377 F. Supp. 1164, 1165-1166 (E.D.N.Y. 1974). The Court of Appeals affirmed, noting that the redistricting plan "left approximately 70% of the state senate and assembly districts in Kings County with white majorities; given that only 65% of the population of the county was white, the 1974 plan would not underrepresent the white population, assuming that voting followed racial lines." United Jewish Organizations v. Wilson, 510 F.2d 512, 523 n.21 (2d Cir. 1975). This Court affirmed. United Jewish Organizations v. Carey, supra.

## A plurality of the Court reasoned:

Implicit in Beer [v. United States, 425 U.S. 130 (1976)] and City of Richmond [v. United States, 422 U.S. 358 (1975)], then is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. That proposition must be rejected and § 5 held unconstitutional to that extent if we are to accept petitioners' view that racial criteria may never be used in redistricting or that they may be used, if at all, only as a specific remedy for past unconstitutional apportionments. We are unwilling to overturn our prior cases, however. Section 5 and its authorization for racial redistricting where appro-

priate to avoid abridging the right to vote on account of race or color are constitutional . . . (N) either the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment.

## U.J.O., 430 U.S. at 161. (emphasis added).

The plurality decision in *U.J.O.* is consistent with the intent of § 5 of the Voting Rights Act. During congressional hearings on the Voting Rights Act, examples of egregious voting discrimination were brought to the attention of Congress and it was determined that measures such as § 5 would be necessary to eliminate the vestiges of discrimination. See H.R. Rep. No. 439, 89th Cong., 1st Sess., 10-11 (1965); S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 8, 12 (1965). See also Allen v. State Board of Elections, 393 U.S. at 548 ("Not underestimating the ingenuity of those bent on preventing Negroes from voting, Congress . . . enacted § 5"). To allow appellants to succeed on their claim would contravene. *U.J.O.* and undercut § 5 and the Voting Rights Act.

North Carolina's attempt to reflect the voting strength of African-American voters is consistent with congressional intent and this Court's precedent. The Court should reject appellants' and Washington Legal Foundation amici invitation to overturn U.J.O. The Court should also reject any argument that it is impermissible for a jurisdiction to create electoral districts that enhance minority voting strength.

## North Carolina's Use of Racial Criteria Is Benign and Not Inconsistent with This Court's Recent Pronouncement on the Use of Racial Preferences.

The appellants and the Republican National Committee amicus assert that North Carolina's use of race creates a presumption of unconstitutionality that can be overcome by a compelling state interest. Although we disagree that a state must show a compelling state interest

before establishing a majority minority district, a state subject to § 5 clearly has a compelling state interest.

Almost a century ago this Court described the right to vote as fundamental because it is "preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). "Other rights . . . even the most basic are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). Unfortunately, for a large number of American citizens the right to vote remained illusory until the passage of the Voting Rights Act in 1965. 42 U.S.C. § 1973 (1982). Through the vigilant enforcement of the Act's provisions by the federal courts and the Department of Justice and compliance by the States the right of minority citizens to participate in the political process is becoming a reality. The Republican National Committee amicus and the Washington Legal Foundation amici, although couching their argument in terms of improper racial classification, actually seek, albeit indirectly, to reverse the enormous gains that African-Americans, Latinos and Asians have made in the political process. If white voters can challenge the creation of majority minority districts on the grounds of reverse discrimination, every majority minority district in this Nation may be placed in jeopardy.

North Carolina's use of race, as a covered jurisdiction, was benign and clearly within the bounds established by this Court to remedy past discrimination. The creation of the two majority African-American districts was not an impermissible "racial quota."

This Court has held that "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."

Metro Broadcasting, Inc. v. F.C.C., 110 S.Ct. 2997 (1990). In Metro Broadcasting, this Court held that "benign race conscious measures mandated by Congress... are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." Id. at 3008-3009. Alternatively, in City of Richmond v. Croson, 488 U.S. 469 (1989), a majority of the Court held that a jurisdiction's use of racial classifications is suspect and requires a showing of a compelling governmental interest.

Irrespective of the equal protection standard this Court deems applicable, the North Carolina congressional plan is constitutional. The benign race conscious districting employed by North Carolina and precleared by the Department of Justice was mandated by Congress. It is beyond doubt that ensuring the right to cast a meaningful vote serves important governmental objectives and that § 5 of the Voting Rights Act is substantially related to achievement of these objectives.

This Court has previously held that promoting diversity of views is an important and permissible government objective within the power of Congress. Metro Broadcasting Inc. v. F.C.C., supra. In Metro Broadcasting Inc. the Court reasoned that it is "a legitimate inference for Congress . . . to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves." Id. 110 S.Ct. at 3018. Promoting diversity of views in legislative chambers—at least as important as seeking diversity in the media—is an important rationale of the Voting Rights Act. The Act has allowed millions

The Democratic National Committee, et al. amici suggest that all jurisdictions are required to consider race in the districting process, but regardless of this Court's view on such use of race by a jurisdiction not subject to § 5, a jurisdiction subject to § 5 has a legitimate and compelling state interest to utilize race.

of minority citizens to fully participate in the political process and to elect candidates of their choice.10

In addition, under even a strict scrutiny test, the State of North Carolina has a compelling state interest to ensure that African-Americans are fairly represented in the political process. Official racial discrimination denied African-Americans the opportunity to participate in the electoral process and resulted in Congress determining that a large section of North Carolina would be subject to \$ 5 of the Voting Rights Act. The lingering effects of that discrimination has continued to deny African-American voters the opportunity to equally participate in the political process and elect representatives of their choice. See Thornburg v. Gingles, 478 U.S. 30 (1986).

The fact that a jurisdiction subject to the provisions of § 5 seeks to ensure that the African-American community will be provided an opportunity to elect candidates of their own choosing to the United States Congress, cannot give rise to a constitutional violation, especially when the creation of the two majority minority districts do not place any undue burdens on non-minorities. <sup>11</sup> Fullilove v. Klutznick, 448 U.S. at 472.

Moreover, the appellants' arguments rest on a flawed premise. Unlike the minority set-aside at issue in *Croson*, supra, the allocation or distress sale of broadcast licenses in *Metro Broadcasting*, supra, or the admissions program in Bakke, supra, the creation of a majority African-American congressional district does not bar or exclude a

white individual from representing the district. North Carolina did not guarantee that two African-Americans will be elected at the expense of white candidates, but simply that African-American voters, if they vote cohesively, could elect two Members of Congress of their choice although not necessarily of their race. North Carolina's action is consistent with the requirement of § 5 that minority voters be provided an opportunity to participate in the political process free of discrimination.

# II. REDISTRICTING INVOLVES FUNDAMENTAL STATE INTERESTS AND ACCORDINGLY, THE JUDICIARY SHOULD DEFER TO STATE POLICY NOT IN CONFLICT WITH FEDERAL OR STATE LEGAL REQUIREMENTS.

The courts have a limited role in the redistricting process. See Chapman v. Meier, 420 U.S. 1, 27 (1975) ("we say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court"). A court in reviewing a redistricting plan "should not pre-empt the legislative task nor intrude upon state policy any more than necessary." White v. Weiser, 412 U.S. 783, 795 (1973).

North Carolina's creation of two congressional districts was pursuant to a legitimate state policy that sought to recognize African-American communities of interests without unduly disrupting existing congressional districts and their incumbents. It is permissible for North Carolina, or any other jurisdiction, to consider race in the districting process and establish majority minority districts wherever it desires, provided the creation of such districts does not dilute minority voting strength in neighboring districts or violate the requirements of one person, one vote.

In Gaffney v. Cummings, 412 U.S. 735 (1973), this Court upheld a redistricting plan that sought to provide

<sup>&</sup>lt;sup>10</sup> Since the passage of the Act, the number of African-American and Hispanic elected officials in the United States has increased dramatically to more than 11,000. See National Association of Latino Elected and Appointed Officials, National Roster of Hispanic Elected Officials (1991); Joint Center for Political and Economic Studies, Black Elected Officials, A National Roster (1991).

<sup>&</sup>lt;sup>11</sup> The appellants are not being denied the right to vote or to elect a candidate of their choice. They are simply placed in a district where a majority of the electorate is African-American.

proportional representation in the legislature to the two main political parties. The Court recognized in *Gaffney* that "politics and political considerations are inseparable from districting and apportionment" and held that:

neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls . . .

Id. 412 U.S. at 754. Similarly, North Carolina sought to recognize the political strength of African-American voters by providing a "rough sort of proportional representation."

The Gaffney Court also questioned the wisdom of simply drawing districts based on some set of neutral criteria:

It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

Id. 412 U.S. at 754. Justice White's comments apply equally to the use of race in the districting process. The racial composition of districts are well known and ignoring racial data could result in the "most grossly racial gerrymandered districts." Id.

The protection of inumbents while complying with the Voting Rights Act was held to be a legitimate state policy in Anne Arundel County Republican Central Committee v. State Advisory Board of Election Laws, 781 F. Supp. 394

(D.Md. 1991), aff'd, 112 S.Ct. 2269 (1992). In Anne Arundel County Republican Central Committee the court reasoned:

this Court defers to Maryland's legislature . . . (which) aimed to give Congressman Hoyer, a congressman with high ranking and importance . . . a safe seat, to provide the majority black population in . . . Prince George's and Montgomery counties with a chance to choose a representative without requiring that person to run against a strong incumbent such as Congressman Hoyer, and to provide certain opportunities for Congresswoman Bentley and Congressman Cardin.

Id. 781 F. Supp. at 398. Although incumbency protection is a legitimate state policy, it may not be accomplished at the expense of minority voting strength. See Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S.Ct. 681 (1991). No one has alleged that North Carolina's protection of incumbents was accomplished at the expense of minority voting strength.

The appellants and Republican National Committee argue that the failure of North Carolina to follow neutral criteria is fatal to the plan. However, courts have been reluctant to require jurisdictions to follow such an ill defined concept as neutral criteria. "(T) o mandate that a legislature reapportion with regard merely to neutral criteria . . . is to give that legislature in practice no guidance at all. Indeed it virtually guarantees that a federal court, in a sort of judicial receivership, will ultimately conduct redistricting." Anne Arundel County Republican Central Committee, 781 F. Supp. at 399; See also Gaffney v. Cummings, supra.

Court drawn plans, on the other hand, are afforded less deference than legislatively drawn plans. 12 Courts are re-

<sup>&</sup>lt;sup>12</sup> See Carstens v. Lamm, 543 F. Supp. 68, 82 (1983) ("Courts are often faced with situations in which several different redistricting plans achieve virtually identical levels of population equality

quired to adhere more strictly than state legislatures to those constitutional and statutory standards governing the redistricting process. Wise v. Lipscomb, 437 U.S. 535, 540 (1978). A function of a court in adopting a redistricting plan is therefore much different from that of a state legislature. Burton v. Sheehan, 793 F. Supp. 1329 (D.S.C. 1992). "This is chiefly because a state legislature is better situated to identify and recommend traditional state policies within the constitutionally mandated framework of substantial population equality. . . In sharp contrast, this Court possesses no distinctive mandate to compromise potentially conflicting state redistricting policies in the people's name." Id. (quoting Connor v. Finch, 431 U.S. 407, 414-415 (1977)).

Redistricting of legislative bodies is fundamentally a "legislative task which federal courts should make every effort not to pre-empt," Wise, 437 U.S. at 539. Since legislatures are better situated to determine state policy, including defining communities of interest and determining whether to adhere to a particular compactness requirement, a court's review of such policy should be extremely limited. A court should look no further than to determine whether the proffered state policy is rational and whether the plan is in compliance with federal and state law. Courts drawing plans, on the other hand, should apply a greater level of scrutiny to ensure impartiality in such a highly political process.

III. FEDERAL LAW DOES NOT REQUIRE THAT DISTRICTING PLANS COMPLY WITH ANY "NEUTRAL CRITERIA".

A congressional redistricting plan is required to comply with the requirements of one person, one vote, the Voting Rights Act and the Fourteenth and Fifteenth Amendments.<sup>13</sup> North Carolina's congressional redistricting plan is not violative of any of these provisions.<sup>14</sup> Although there is no federal requirement that a congressional redistricting plan satisfy any additional criteria, it is alleged that the "odd configurations" of the congressional districts violates appellants' constitutional rights.<sup>16</sup>

Congress has occasionally imposed on States certain redistricting standards for congressional districts.<sup>16</sup> In

without substantially diluting minority rights. In these cases, no reasoned decision can be based solely on these two constitutional criteria. The court must accommodate other relevant criteria in determining whether to accept a proposed plan or to adopt a new one"); Arizonans for Fair Representation v. Symington, No. CIV 92-256-PHX-SMM (D.Az. May 6, 1992) ("Once the constitutional and Voting Rights Act standards are met a court may look to several neutral criteria"); Prosser v. Elections Board, 793 F. Supp. 859 (W.D. Wis. 1992).

standards for state legislative redistricting. North Carolina, for example, requires that all state legislative districts consist of contiguous territory. N.C. Const. art. II, § 3 and § 4. However, North Carolina, like most other states, does not provide any additional requirements for congressional redistricting. National Conference of State Legislatures, Redistricting Provisions: 50 State Profiles (1989).

<sup>14</sup> This Court affirmed a district court's ruling dismissing a partisan gerrymandering challenge filed on behalf of Republicans. Pope v. Blue, Civ. No. 3:92CV71-P (W.D.N.C. April 15, 1992), aff'd 113 S.Ct. 30 (1992). In addition, there has been no claim that the plan is violative of either the Voting Rights Act or equal population requirements. The only challenge presented in this appeal is that the plan somehow violates the equal protection of white voters.

<sup>15</sup> The failure to adhere to neutral criteria may be evidence of invidious discrimination against a protected class, Gomillion v. Lightfoot, 364 U.S. 339 (1960), or against a particular group. Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77 (1985). Nevertheless, uncouth or irregularly shaped districts are not in and of themselves constitutionally suspect. Badham v. Eu, 694 F. Supp. 664, 671 (N.D. Cal. 1988), aff'd 109 S. Ct. 829 (1989).

<sup>16</sup> The Apportionment Act of 1911, 37 Stat. 13 (1911), provided: That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third

the Apportionment Act of 1929, 46 Stat. 21 (1929), Congress omitted any requirement that congressional districts consist of contiguous and compact territory. This Court, in Wood v. Brown, 257 U.S. 1 (1932), reviewed the legislative history of the 1929 Act and held that "it was manifestly the intention of the Congress not to reenact the provision as to compactness, contiguity and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929." Id. 257 U.S. at 7.

Since 1929, Congress has chosen to leave to the states the criteria to be employed in redrawing election boundaries and has declined to reimpose any requirements for congressional districts. 2 U.S.C. § 2a (1990). No federal statute presently requires that districts be compact, contiguous, recognize communities of interest or preserve political subdivision boundaries. Congress has recognized that state and local legislatures are better equipped to determine these other factors than Congress or any national agency. Celler, Congressional Apportionment—Past, Present and Future, 17 Law & Contemp. Probs. 268, 274 (1952).

This Court, on the other hand, has held that minority plaintiffs cannot succeed on a vote dilution claim unless they can establish that they are geographically compact. Thornburg v. Gingles, 478 U.S. at 50-51. Although a jurisdiction has wide discretion in the drawing of congressional districts, a court's discretion, as recognized by this Court in Gingles, is more narrow. A court may not order a jurisdiction to draw minority districts that are not geographically compact. However, if a jurisdiction decides to recognize a community of interest, a court may not reject the jurisdiction's decision for failing to comply with some aesthetic norm.

The appellants and Republican National Committee amicus contend that the Twelfth Congressional District completely diverges from any rational redistricting principles. However, assuming such principles are required, the Twelfth District, despite its odd shape, is still compact—the district recognizes a community of interest, mainly urban African-Americans with similar concerns and interests, is easily traversed and has less land area than any other North Carolina congressional district.

IV. ALL JURISDICTIONS HAVE UTILIZED RACIAL CRITERIA IN THE DRAWING OF NEW LEGISLATIVE AND CONGRESSIONAL DISTRICTS FOLLOWING THE 1990 CENSUS AND A REVERSAL OF THE DISTRICT COURT'S DECISION WILL SEVERELY DISRUPT THE POLITICAL PROCESS AND PLACE IN JEOPARDY NEARLY ALL MAJORITY MINORITY DISTRICTS.

As this Court is well aware, all jurisdictions utilize racial criteria in the districting process. The Census Bureau provides racial and ethnic data to the states pursuant to 2 U.S.C. 2a (1990) and 13 U.S.C. 141 (1990). As a result, the racial composition of all districts is easily attainable.

The 1990 redistricting process has led to enormous gains in the number of minority elected officials. Alabama, Florida, North Carolina, South Carolina and Virginia elected African-Americans to the Congress for the first time in the Twentieth Century. The 103rd Congress is the most ethnically and racially diverse Congress in our Nation's history.<sup>17</sup> This diversity is the result of an increase in the number of districts with significant minority population.<sup>18</sup>

and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory. . .

<sup>&</sup>lt;sup>17</sup> The 103rd Congress includes 38 African-Americans, 17 Latinos and 4 Asians, excluding Delegates. This is an overall increase of 22 from the 102nd Congress.

<sup>&</sup>lt;sup>18</sup> Due to the continued existence of legally significant racially polarized voting in numerous jurisdictions, minority representatives,

The continued diversity of our Nation's legislatures is threatened by this pending claim. If the appellants succeed and the district court's decision is reversed, the validity of countless minority districts will become suspect. The disruption to the political process would be immense due to the numerous challenges to existing districts that would be sure to follow. In addition, legislators, especially in states subject to § 5, would be placed in an untenable situation: To comply with the Voting Rights Act racial considerations are necessary, on the other hand, a legislature's discretion would be severely limited and continuously subject to challenge.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

WAYNE R. ARDEN
JEFFREY M. WICE
Counsel of Record
430 South Capitol Street, S.E.
Washington, D.C. 20003
(202) 479-5161

with limited exceptions, are only elected from districst that contain close to or an absolute majority of minority voters. There are exceptions however, such as the State of Ohio where every state house district in excess of 35% African-American has elected an African-American. Voinovich v. Quilter, appeal pending, No. 91-1618, J.S. App. 141a.

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IN THE

## Supreme Court of the United Stufen OF THE CLERK

OCTOBER TERM, 1992

RUTH O. SHAW, et al.,
Appellants,

STUART M. GERSON,
Acting Attorney General, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF AMICI CURIAE OF BOLLEY JOHNSON,
SPEAKER OF THE FLORIDA HOUSE OF
REPRESENTATIVES, AND PETER R. WALLACE,
CHAIRMAN OF THE REAPPORTIONMENT
COMMITTEE OF THE FLORIDA HOUSE OF
REPRESENTATIVES, IN SUPPORT OF APPELLEES

Donald B. Verrilli, Jr.
Scott A. Sinder
Thomas J. Perrelli
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Kevin X. Crowley
James A. Peters
Cobb, Cole & Bell
131 North Gadsden Street
Tallahassee, Florida 32301
(904) 681-3233
Counsel for Amici Curiae

\* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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# Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-357

RUTH O. SHAW, et al.,

Appellants,

STUART M. GERSON, Acting Attorney General, et al., Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF AMICI CURIAE OF BOLLEY JOHNSON, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, AND PETER R. WALLACE, CHAIRMAN OF THE REAPPORTIONMENT COMMITTEE OF THE FLORIDA HOUSE OF REPRESENTATIVES, IN SUPPORT OF APPELLEES

## INTEREST OF AMICI

Amici Bolley Johnson and Peter R. Wallace are the Speaker and the Chairman of the Reapportionment Committee of the Florida House of Representatives, respectively. In their official capacities, Amici have lead responsibility in the House for reapportionment in the State of Florida. Resolution of the issues presented in this case

<sup>&</sup>lt;sup>1</sup> Pursuant to Rule 37.2, the parties have consented to the filing of this brief. Letters memorializing their consent have been filed with the Clerk of this Court.

may profoundly affect the interests of Amici, and the State of Florida, in two ways.

First, this case raises important issues involving the extent to which race can be taken into account in the process of reapportionment. The resolution of these issues may well have a dramatic practical impact on the way reapportionment is conducted in the future. Moreover, because legislative districting decisions are constitutive elements of state sovereignty, any imposition of new federal constitutional limits on redistricting raises important federalism concerns. Amici wish to participate to ensure that the interests of the State of Florida, and of the States generally, are adequately considered in shaping appropriate constitutional principles in this critically important activity.

Second, because several counties in Florida are "covered counties" within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(b), resolution of the specific question posed by the Court in this case will shape the nature of the relationship between the State of Florida and the United States Department of Justice with respect to the preclearance process.

Moreover, Amici are presently Appellants in a case pending before this Court involving Section 2 of the Voting Rights Act, Wetherell v. De Grandy, No. 92-519, probable jurisdiction noted, Feb. 22, 1993, and seek to make clear that eresolution of the fundamental issues presented herein, and potentially in Voinovich v. Quilter, No. 91-1618, jurisdiction noted, 112 S. Ct. 2299 (1992), as well, should have no bearing on the issues presented in No. 92-519.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The question framed by this Court for review appears to be a narrow one: whether a State's intent to comply with the Voting Rights Act, and the Attorney General's interpretation thereof during Section 5 preclearance, precludes a finding that the State's legislative reapportionment plan was adopted with invidious discriminatory intent, where the legislature adopted a plan that departed from suggestions of the Attorney General after preclearance review.

The Court's answer may, however, have a sweeping impact on States like Florida which contain substantial racial and ethnic communities of interest. Subsumed within the Court's question is an issue of fundamental practical and theoretical importance: to what extent does the Fourteenth Amendment restrict a State's consideration of race when reapportioning state legislatures and congressional districts after each decennial census?

Appellants offer a simple, but extreme, answer. Drawing on this Court's recent precedents prohibiting the race-conscious use of peremptory challenges,<sup>3</sup> Appellants contend that States may never consider race in reapportionment. See Brief of Appellants in No. 92-357 at 29-40 ("Appellants Br."). Alternatively, Appellants suggest, race may be considered only to the extent necessary to remedy proven racial discrimination against specific individuals. Id. at 52-53. Appellants expressly reject the argument that good faith efforts to comply with the requirements of the Voting Rights Act should rebut the charge of unconstitutionality. Id. at 52-53. They forth-rightly call for overruling of United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977), and urge a regime of purported "color blind" reapportionment.

<sup>&</sup>lt;sup>2</sup> A new session of the Florida legislature has commenced since the appeal was filed. As a result, Representative Johnson has replaced Representative Wetherell as Speaker. He will be substituted as a named Appellant in No. 92-519.

<sup>&</sup>lt;sup>3</sup> Georgia v. McCollum, 112 S. Ct. 2348 (1992); Edmundson v. Lee Concrete Co., 111 S. Ct. 2077 (1991); Powers v. Ohio, 111 S. Ct. 1364 (1991); Batson v. Kentucky, 476 U.S. 79 (1986).

Certain Amici have suggested a less categorical, but hardly less extreme, answer to the question posed by this Court. Amicus Republican National Committee ("RNC"), for example, argues that the consideration of race in reapportionment should "create a presumption of unconstitutionality" triggering strict equal protection scrutiny. See Brief Amicus Curiae of the Republican National Committee ("RNC Br.") at 2. If a State seeks to defend race-conscious districting as necessary to comply with the Voting Rights Act, RNC further argues, any such defense should be accepted only if the plan drawn by the State more closely conforms to purported "sound redistricting principles" than does any available alternative redistricting plan, and only if the State's districts can be shown to lack partisan political purposes.

The Florida House *Amici* believe the positions advanced by Appellants and their supporting *Amici* are fundamentally misconceived for three related reasons:

First, Appellants' arguments display little understanding of the bedrock realities of reapportionment. Reapportionment is, at bottom, an exercise in the allocation of political power. Identifiable interests within a State—individuals, classes of citizens (such as the aged), traditional racial, ethnic and religious communities of interest, regional interests, industries, and interests of every other kind—will have more or less influence in the legislature depending on where district lines are drawn. Precluding the consideration of race thus will not bring about "color blind" reapportionment. It will have the perverse consequence of disadvantaging minority citizens and communities of interest because they will be the only groups of citizens whose interests cannot be considered in the reapportionment process. (Point I).

Second, the constitutional standards Appellants propose are unrealistically indifferent to the requirements of the Voting Rights Act, and the needs of States seeking in good faith to comply with the Act. Both the amended Section 2 of the Act, as interpreted by this Court in Thornburg v. Gingles, 478 U.S. 30 (1986), and the Section 5 preclearance process require a State to consider race in order to ensure compliance with federal law. Barring any constitutional consideration of race, as Appellants urge, would force States to choose between violating the Constitution or risking violation of the Voting Rights Act every time they redistrict. Applying strict scrutiny, as Amicus RNC urges, achieves results only slightly less pernicious. It will be extremely difficult for States to enact plans that are both the "least restrictive means" of complying with the Voting Rights Act (as strict scrutiny requires) and accomplish a workable accommodation of the myriad competing interests that any statewide reapportionment plan must reconcile. (Point II).

Third, this Court should reject Amicus RNC's invitation to subject the inevitable political accommodations of reapportionment to searching judicial scrutiny whenever States with sizeable minority populations must consider race in order to comply with the Voting Rights Act. The Constitution imposes no requirement that legislative districts be compact or contiguous. Nor does it, within very wide limits, preclude allocating districts to reflect the political strength of the major parties, to protect incumbents or to achieve a host of other political objectives. If adopted, RNC's proposed analysis would subject the redistricting plans of States with significant minority populations to a more stringent level of constitutional scrutiny than would be applied to other States. At bottom, RNC advocates strict scrutiny of state political judgments to which this Court has traditionally afforded great deference. RNC's standard is, moreover, inadministrable because there are no judicially manageable standards for

<sup>&</sup>lt;sup>4</sup> See RNC Br. at 12-13; id. at 15 (North Carolina "cannot reasonably maintain that the Voting Rights Act justifies the challenged districts, particularly where less onerous plans consistent with the Act were rejected.").

<sup>5</sup> RNC Br. at 18-20.

determining when allegedly partisan considerations have resulted in too substantial a departure from allegedly neutral districting criteria. See Davis v. Bandemer, 478 U.S. 109, 144 (1986) (O'Connor, J., concurring in the judgment). The apparent purpose, and certain effect, of such an approach will be to transfer to the federal judiciary virtually all reapportionment responsibilities and draw the judiciary into this political thicket. (Point III).

Amici also respectfully suggest that this Court's resolution of the question presented in the instant case should have no bearing on the issues presently before the Court in No. 92-519, Wetherell v. De Grandy. (Point IV).

## ARGUMENT

- I. A PROPER UNDERSTANDING OF THE REALITIES OF THE REAPPORTIONMENT PROCESS PRECLUDES ADOPTION OF STRICT CONSTITUTIONAL RULES FORBIDDING CONSIDERATION OF RACE.
  - A. Reapportionment Is, By Its Nature, A Process That Requires the Consideration and Accommodation of All Significant Interests Within A State.

Once each decade, state legislatures must engage in the extraordinarily difficult and time consuming process of reapportionment. Ultimately, a State must choose a single reapportionment plan from an almost infinite variety of possible options. The constitutional constraint

of "one person, one vote" imposes no significant limit on the number of possible districting plans that can be drawn: "it would require sheer happenstance or skilled agenda manipulation for even selfless, rational legislators to converge on only one." <sup>8</sup>

By their very nature, the lines drawn in a reapportionment plan will have effects—political, social and racial. As one commentator has noted:

There is simply no way of drawing a redistricting plan without effects, both representational and partisan political. Give a chimp in a zoo a crayon and a map, and the resulting plan will have differential effects on people.

Backstrom, Problems of Implementing Redistricting, in Representation and Redistricting Issues, supra, 46. The Court has repeatedly recognized this essential characteristic of reapportionment. "The key concept to grasp is that there are no neutral lines for legislative districts. . . . [E] very line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place." Davis v. Bandemer, 478 U.S. at 129 n.10 (plurality opinion). "Politics and political considerations are inseparable from districting and apportionment. . . . District lines are rarely neutral phenomena. . . . The reality is that redistricting inevitably has and is intended to have substantial political consequences." Gaffney v.

<sup>6&</sup>quot;[T]he practice of redistricting is quite complicated. A great deal of time and money is spent on drawing and analyzing plans. Reapportionment staffs collect immense amounts of data and build or purchase sophisticated computer systems to aid them in their tasks. The legislators themselves sit through numerous meetings, arguing about various proposals and bargaining for a better seat. The legislative leadership, too, must devote time to putting together the votes for a bill, time that some would say could be better spent on more pressing policy matters." See B. Cain, The Reapportionment Puzzle 9 (1984).

<sup>&</sup>lt;sup>7</sup> "The computer has revolutionized the methodology of reapportionment and redistricting. Infinite variations for legislative dis-

tricting are now available at the push of a button. Neither legislatures nor courts are sure how to respond to this infinity of choice." McKay, *Introduction to Part I*, in Representation and Redistricting Issues 5 (B. Grofman, A. Lijphart, R. McKay & H. Scarrow eds. 1982).

<sup>&</sup>lt;sup>8</sup> Schuck, The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum. L. Rev. 1325, 1337 (1987).

<sup>&</sup>lt;sup>9</sup> Quoting R. Dixon, Fair Criteria and Procedures for Establishing Legislative Districts, in Representation and Redistricting Issues, supra, 7-8.

Cummings, 412 U.S. 735, 752-53 (1973). See also Whitcomb v. Chavis, 403 U.S. 124, 149 (1971). 10

When state legislatures adopt a reapportionment plan, they do so with a ready appreciation of the likely political consequences of that plan. With the advent of computer technology and the increased precision of our knowledge of demographics, the effect of any minor alteration in a districting map can be calculated fairly precisely. "[I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *Id.* The choice of one plan over other possible redistricting options, therefore, is inevitably and irreducibly political.

This non-neutrality is not simply unavoidable; it is a part of the democratic political process that has long been accented and even honored. See id. As Justice

White's opinion in Gaffney v. Cummings acknowledged, "districting . . . is intended to have substantial political consequences." Reapportionment implicates "fundamental choices about the nature of representation." Burns v. Richardson, 384 U.S. 73, 92 (1966). Interest groups and coalitions seek their preferred outcome in the political process in the form of district lines. This is entirely consistent with the vision of the framers. See Federalist No. 56 at 351-52 (Henry Cabot Lodge ed. 1892). 13

For these reasons, this Court has repeatedly recognized that reapportionment is the preserve of state legislatures, which are the appropriate bodies to balance the myriad of state and local policies at stake in redistricting decisions. See Connor v. Finch, 431 U.S. 407, 414-15 (1977). States may draw their districts to be compact and contiguous. They may seek to preserve traditional political boundaries; maintain communities of interest and residential patterns; for preserve incumbencies; minimize contests

<sup>&</sup>lt;sup>10</sup> See Davis, 478 U.S. at 129 n.10; Kirkpatrick v. Preisler, 394 U.S. 526, 554-55 (1969) (White, J., dissenting) ("In reality, of course, districting is itself a gerrymandering in the sense that it represents a complex blend of political, economic, regional, and historical considerations."); Backstrom, Problems in Implementing Districting, in-Representation and Redistricting Issues, supra, 45 ("gerrymandering is not merely an optical judgment as to whether districts snake too scandalously over a map. Instead it consists of one group of partisans gaining an undue advantage over another. even in regular-shaped districts."); Schuck, The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum. L. Rev. 1325, 1336-37 (1987) ("Most of the important districting criteria-especially compactness, preservation of political subdivisions, and competitiveness-that courts and other opponents of gerrymandering routinely invoke are not neutral either in the ideal sense . . . or in the weaker sense that the criteria do not systematically favor one party or another."). Although compactness has limited inherent virtue, its primary value is that it furthers the policies of protecting communities of interest and traditional political boundaries. See B. Cain, supra, at 33-50.

<sup>&</sup>lt;sup>11-"</sup>As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Davis*, 478 U.S. at 129; *Gaffney*, 412 U.S. at 753.

<sup>&</sup>lt;sup>12</sup> Majority coalitions occasionally gain too much influence; the volatility of competing factions, however, ensures that such control is rare and short-lived. As some members of this Court have recognized, gerrymandering is a "self-limiting enterprise." Davis, 478 U.S. at 152-53 (O'Connor, J., concurring in the judgment).

<sup>&</sup>lt;sup>13</sup> See also B. Cain, The Reapportionment Puzzle 179-80 (1984) (describing the Madisonian vision of institutions providing a forum for competing groups to form coalitions to advance specific policies).

<sup>&</sup>lt;sup>14</sup> See Connor v. Finch, 431 U.S. 407 (1977); Karcher v. Daggett, 462 U.S. 725, 755 n.15 (1983) (Stevens, J., concurring).

<sup>15</sup> See Mahan v. Howell, 410 U.S. 315, 328 (1973).

<sup>16</sup> See Karcher, 462 U.S. at 734 n.6 (noting with approval the Colorado Constitution's preference for protecting communities of interest); id. at 776 n.12 (White, J., dissenting) (quoting a commentator decrying the shift from "preservation of community boundaries and the grouping of constituencies with similar concerns").

<sup>17</sup> Anne Arundel County Republican Central Committee v. State Advisory Board of Election Laws, 781 F. Supp. 394 (D. Md. 1991), aff'd, 112 S. Ct. 2269 (1992); Karcher v. Daggett, 462 U.S. at 740.

between incumbents; strike a balance among regions (urban and rural, coastal and inland); allocate power between the predominant political parties; 18 or achieve a host of other overtly political objectives. 19

Never before has the Court attempted to control these state policy choices. To the contrary, recognizing that structuring the legislature to achieve a fair accommodation of contending interests is at the core of state sovereignty, this Court has severely constrained federal intrusion into the reapportionment process. E.g. Upham v. Seamon, 456 U.S. 37 (1982); McDaniel v. Sanchez, 452 U.S. 130, 150 n.30 (1981); Wise v. Lipscomb, 437 U.S. 535, 539 (1978); White v. Weiser, 412 U.S. 783, 795 (1973); Scott v. Germano, 381 U.S. 407 (1965) (per curiam). Placing such policy balancing on a constitutional footing "embroil[s] the judiciary in second-guessing what has consistently been referred to as a political task for the legislature." Davis, 478 U.S. at 133.

State legislatures engaged in this extraordinarily difficult enterprise will as a matter of course consider how a proposed reapportionment plan affects the State's racial and ethnic minorities.<sup>21</sup> That is because, inevitably, some of a State's traditional communities of interest will be defined by a common race or ethnicity. There are traditional African-American, Hispanic or Asian communities of interest, just as there are traditional Irish, Polish, and Jewish communities of interest, and just as there are traditional rural communities of interest centering on common agricultural pursuits, coastal communities of interest centering on tourism or the fishing industry, urban communities of interest centering on a particular industrial base, and myriad others.

When state legislatures consider traditional racial communities of interest in this way, they are not, in any meaningful sense, engaging in race-based classification—even of a benign sort. They are not affording to a specified group, classified by race, a benefit or advantage not equally available to all citizens or groups. They are simply recognizing racially-defined communities of interest and affording to them the same consideration afforded every other community of interest in the reapportionment process.

Thus, when Appellants argue that reapportionment should be "color blind," they are not asking for equality of treatment. To the contrary, under Appellants' theory, a State could consider all group interests and accommodate them in the reapportionment process, except those of communities defined by race. The Fourteenth and Fifteenth Amendments were enacted largely to ensure that racial minorities would have the same opportunity as all other citizens and groups to participate in the political process. It would pervert these historic guarantees to hold that States must blind themselves to the interests of minority communities in the reapportionment process. Appellants' argument, if accepted, would have the effect of giving racial communities of interest less than equal opportunity.

## B. This Court's Fourteenth Amendment Jurisprudence Casts No Doubt On the Legitimacy of Considering Race In Statewide Reapportionment.

Nothing in this Court's Fourteenth Amendment jurisprudence precludes, or requires strict scrutiny for, all

<sup>18</sup> Gaffney v. Cummings, 412 U.S. at 754.

<sup>&</sup>lt;sup>19</sup> See generally Baker v. Carr, 369 U.S. 186, 323-24 (1962) (Frankfurter, J., dissenting).

<sup>&</sup>lt;sup>20</sup> See, e.g, Gaffney, 412 U.S. at 752 n.18 ("compactness or attractiveness have never been held to constitute an independent federal constitutional requirement").

<sup>&</sup>lt;sup>21</sup> Indeed, in enacting Sections 2 and 5 of the Voting Rights Act, Congress has mandated such consideration and has explicitly recognized that racial and ethnic minorities generally form identifiable communities 'interest. See Part II, supra.

ocnsideration of racial interests by State legislatures engaging in reapportionment.

To the contrary, opinions of this Court have never found fault with a State's consideration of racial communities of interest in the reapportionment process. In City of Richmond v. United States, 422 U.S. 358 (1975), this Court approved an annexation which "fairly reflected the strength" of the minority communities. In Beer v. United States, 425 U.S. 130 (1976), the Court found a reapportionment plan "ameliorative" and thus in compliance with Section 5 because the plan increased the number of majority-minority districts. In United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977), the Court upheld a race-conscious districting plan and the plurality noted that reapportionment "would often necessitate the use of racial consideration in drawing district lines." Id. at 159 (plurality opinion). The Court explicitly recognized that "the Constitution does not prevent a State . . . from deliberately creating or preserving [minority] majorities in particular districts." Id. at 161 (plurality opinion); id. at 165-68 (opinion of the Court). Finally, in considering the amended § 2, every Member of the Court agreed that a court must, in some fashion, consider minority voting strength, as well as other racespecific factors, in order to assess whether a State has complied with the requirements of the Act, as well as the Constitution. See Thornburg v. Gingles, 478 U.S. 30 (1986). See also Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (Opinion of Burger, C.J., White, J., and Powell, J.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986) (O'Connor, J., concurring).

These cases recognize the special characteristics of reapportionment that set it apart from other contexts where States are generally forbidden to use racial interests as a decisionmaking criterion. The creation of a majorityminority district simply acknowledges that there is a legitimate community of interest that is sufficiently cohesive and compact that it would be able to elect a representative of its choice in a given district. In legislating to create majority-minority districts, the State determines whether such a community exists irrespective of race.<sup>22</sup> If a State can validly create a majority Polish or Catholic or rural district, because there is a legitimate community of interest which shares beliefs and concerns warranting a voice in the legislature, then a State must be able to afford minority communities of interest equal consideration in the reapportionment process.

That is not to say that consideration of race by a reapportioning body should never trigger searching Fourteenth Amendment scrutiny. Claims that race conscious redistricting constitutes intentional discrimination against minority groups plainly warrant heightened scrutiny. E.g. Gomillion v. Lightfoot, 364 U.S. 339 (1960); Rogers v. Lodge, 458 U.S. 613 (1982). A districting scheme which greatly overrepresents a racial minority in comparison to its proportion of the voting population might also, in some circumstances, give rise to an inference of invidious discrimination. But such issues are not presented in this case because Appellants' complaint to the three-judge court made no such allegations.

II. STATES MUST BE PERMITTED TO CONSIDER RACE IN THE REAPPORTIONMENT PROCESS IN ORDER TO COMPLY WITH THE VOTING RIGHTS ACT.

If, contrary to our arguments in Point I, this Court determines that the reapportionment decisions at issue in

This is a far cry from the "naked racial preference" embodied in a minority set-aside. Further, in redistricting, there is no injury to third parties because they retain an equal vote (especially, as here, where there is no dilution claim). Cf. Regents of the University of California v. Bakke, 438 U.S. 265, 300 n.39 (1978).

this case are the kind of race-conscious government action generally subject to searching equal protection scrutiny, the positions advanced by Appellants and their supporting *Amici* must nonetheless be rejected because the Voting Rights Act requires States to consider race during reapportionment.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, makes illegal any State reapportionment plan that his discriminatory effects upon the voting rights of minority citizens. 42 U.S.C. § 1973(b). See Thornburg v. Gingles, 4/8 U.S. 30, 47 (1986). To comply with Section 2, a State must consider the impact of any proposed plan on minority citizens in order to determine whether that redistricting plan minimizes or cancels out the voting strength of those citizens. Gingles, 478 U.S. at 44. Indeed, this Court has made clear that "[t]he 'right' question . . . is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." Gingles, 478 U.S. at 44 (quoting S. Rep. No. 97-417, 97th Cong., 2nd Sess. 28 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News at 177, 206) (emphasis added). To "answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities." Id. (emphasis added).

Section 5 of the Voting Rights Act likewise requires the consideration of race in reapportionment. States like Florida, which contain counties subject to Section 5's preclearance requirements, may not implement reapportionment plans that have not been precleared. See Chisolm v. Roemer, 111 S. Ct. 2354 (1991). Preclearance requires a demonstration both that the proposed reapportionment plan is not "retrogressive," and, more broadly, that the plan does not deny equal electoral opportunity in violation of Section 2 of the Act. Beer v. United States, 425 U.S. 130 (1976). To avoid the diffi-

culties attendant upon a denial of preclearance, a State must, as a practical matter, consider race in formulating a plan. Likewise, in responding to denial of preclearance, a State must, as a practical matter, consider race to remedy defects identified in the preclearance process <sup>23</sup>—as North Carolina did here.

If a State' consideration of race is entirely barred or subjected to strict scrutiny, reapportionment will be reduced to a game of chance. States will have to consciously blind themselves to ways proposed redistricting plans will affect minority voters, and then hope their enacted plans do not deny to minority voters an equal opportunity to elect their preferred candidates. The likelihood that a plan in compliance with the Voting Rights Act will emerge from this process of "color blind" reapportionment is virtually nonexistent. Thus, adoption of the position advanced by Appellants will force States to choose between considering race and facing a Fourteenth Amendment challenge from white voters, or ignoring race and facing a Voting Rights Act challenge from minority voters. The net effect of such a legal regime would be wholesale transfer of the reapportionment process to the federal courts.

Fortunately, nothing in this Court's Fourteenth Amendment jurisprudence requires such a result. Acting under the Fourteenth and Fifteenth Amendments, Congress has affirmatively required States to consider race in the re-

<sup>§ 5</sup> preclearance must submit a variety of race-specific information, inculding a "statement of the anticipated effect of the change on members of racial or language minority groups," 28 C.F.R. § 51.27 (n) (1992), race and language demographic information, id. at § 51.28(a), and a list of names of minority group members who would be "expected to be familiar with the proposed changes or who have been active in the political process," id. at § 51.28(h). Further, the regulations explicitly state that the submissions will be evaluated in a race-conscious manner. See id. at § 51.54 & 51-59.

apportionment process.24 In Fullilove v. Klutznick, 448 U.S. 448 (1980), three Justices set out the apporpriate standard: "a state may employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation." Id. at 483 (Opinion of Burger, C.J., White, J., and Powell, J.) (emphasis added).25 In Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), Justice O'Connor placed this principle squarely within the States' duty to satisfy their constitutional and statutory obligations. Id. at 291 (O'Connor, J., concurring). If States do not consider race, they may well design plans with a dilutive effect. The very enactment of the plan will then be a statutory violation, thus triggering a race-conscious remedy. To consider race beforehand is more than simple administrative efficiency; it is part of the State's affirmative duty not to discriminate. See id, at 290-91 (O'Connor, J., concurring) (noting the importance of voluntary compliance on the part of the States); see also McDaniel v. Barresi. 402 U.S. 39 (1971).

Indeed, in City of Richmond v. Croson, 488 U.S. 469 (1989), a case on which Appellants principally rely, this Court noted that there was a fundamental difference between independent race-conscious State action and such action taken pursuant to a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. "Congress may authorize, pursuant to section 5, State action that would be foreclosed to the States, acting alone." Croson, 488 U.S. at 491.26 Under the Voting Rights Act,

Congress has affirmatively commanded the States to prevent minority vote dilution and thus to consider race in redistricting.

If this Court nonetheless concludes that more exacting Fourteenth Amendment scrutiny is required, then, at an absolute minimum, a State must be entitled to consider race when, under Thornburg v. Gingles, the failure to consider race would create a prima facie violation of the Voting Rights Act. In Gingles, this Court established that the failure to draw minority-majority districts constitutes a prima facie violation of Section 2 whenever: (i) "[a] sufficiently large and geographically compact" minority group could constitute a majority in a singlemember district, Gingles, 478 U.S. at 50; (ii) the minority group is "politically cohesive," id. at 51; and (iii) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." Id.27 Thus, if racially polarized voting exists and a State chooses to draw a minority district, that choice should not violate the Equal Protection Clause because it is necessary to ensure equal electoral opportunity for minority citizens. That is, without question, a compelling State interest.28

<sup>&</sup>lt;sup>24</sup> Amici do not understand this case to raise the issue of whether the enactment of the Voting Rights Act was a constitutional exercise of Congressional power.

<sup>25</sup> Three other Justices in Fullilove indicated their approval for such State action on other grounds.

<sup>&</sup>lt;sup>26</sup> Quoting Bohrer, Bakke, Weber, and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L.J. 473, 512-13 (1981)).

<sup>&</sup>lt;sup>27</sup> The Gingles factors may be used in this manner because they define when membership in a minority group has independent political significance. If a minority group is politically cohesive and the white majority generally votes in a manner that is in opposition to the expressed preferences of members of the minority group, then the State has a compelling interest in considering the political interests of the minority group when drawing district lines.

<sup>&</sup>lt;sup>28</sup> Amici do not believe that strict scrutiny should automatically apply whenever a State fails to show that the Gingles criteria can be satisfied. See Point I, supra. It may be, however, that the decision to draw minority districts absent a showing of systemic racially polarized voting was at the root of the district court's concern in Quilter v. Voinovich, 794 F. Supp. 695, 701 (N.D. Ohio 1992) (three-judge court), probable jurisdiction noted, 112 S. Ct. 229 (1992), appeal pending, No. 91-1619. If this Court should apply exacting Equal Protection scrutiny to the plan at issue in Quilter

Application of the "least restrictive means" part of the strict scrutiny test would, however, be wholly unwarranted in this context. Indeed, it is difficult to conceive of how that test would apply. Section 2 of the Voting Rights Act does not require proportional representation for minority citizens. 42 U.S.C. § 1973(b). Some State plans may, therefore, satisfy Section 2 even though they provide something short of proportional representation. But there is no fixed standard for determining how far below proportional representation a plan can fall without triggering Section 2 liability. It will, therefore, almost always be open to plaintiffs challenging a plan to argue that a State could have drawn one less minority district and still complied with Section 2.

Similarly, because modern computer science permits the instantaneous creation of an almost infinite variety of alternative reapportionment plans, it will virtually always be open to plaintiffs to argue that drawing district lines slightly differently would have been a "less restrictive alternative" than the one chosen by the State. As demonstrated, see Point I supra, the creation of a politically viable reapportionment plan requires the reconciliation of myriad competing claims and interests. The extreme difficulty required to reconcile competing interests in a workable plan provides a powerful reason for affording States reasonable latitude in their reapportionment choices.

III. THE POLITICAL JUDGMENTS THAT SHAPE A STATE REAPPORTIONMENT PLAN SHOULD NOT BE SUBJECTED TO SEARCHING JUDICIAL SCRUTINY MERELY BECAUSE A STATE MUST ALSO CONSIDER RACE IN ORDER TO COMPLY WITH THE VOTING RIGHTS ACT.

If this Court should decide that exacting equal protection scrutiny applies to the reapportionment decisions at issue here, the Court should not adopt the analysis advanced by Amicus RNC. That analysis requires judicial invalidation of any plan in which a minority district was intentionally created unless the particular district (i) conforms better to purported "neutral districting criteria" than other feasible options and (ii) is not the result of partisan motivations.

At bottom, RNC argues that the political component of reapportionment decisions should be subjected to more exacting equal protection scrutiny than would otherwise be appropriate whenever a State reapportionment plan also contains districts created for race conscious reasons. This proposal lacks any logical or conceptual moorings. If a State may legitimately engage in race-conscious action by drawing a district to give minority citizens equal opportunity to elect their preferred candidates, and as here, the population patterns of the State permit more than one option for drawing that district, then the State's action will be equally race-conscious whether it chooses to create that district in one part of the State rather than another, or whether it chooses to draw that district in one shape rather than another. By choosing to create one possible district rather than another, a State may well be acting for some or all of-the "political" purposes identified in Point I supra. But neither choice is more race conscious than the other; neither offends the proscriptions against race conscious decisionmaking more than the other. Thus, an equal protection principle designed to limit race-conscious redistricting would not be satisfied or violated to any greater or lesser extent by

for this reason, that outcome should not affect the result in Wetherell v. De Grandy because the district court found racially polarized voting in the Dade County area. See Point IV, infra.

Furthermore, a State's justification would be less compelling if a reapportionment plan affords a minority class substantially more than statewide proportional representation. No such facts are alleged in this case, however.

choosing one option rather than the other for political but nonracial reasons.

The identical reasoning applies to the issue regardless of the Attorney General's position during preclearance review. Under the Act, the Attorney General's preclearance review role is limited to "interpos[ing] an objection" if a submission fails to satisfy § 5 requirements. 42 U.S.C. § 1973c. While the Attorney General may sometimes provide an explanation of the manner in which a proposed change is not free from discriminatory purpose or effect, it is beyond the scope of the Attorney General's statutory authority to mandate the implementation of any particular redistricting plan. See id. Even assuming that the Attorney General's denial of preclearance is accompanied by a specific proposed remedy—and Amici believe the Attorney General never specifies remedies-a State's decision to remedy identified vote dilution by drawing districts different from those suggested by the Attorney General does not render the State's conduct "more" race conscious, and hence worthy of more exacting judicial scrutiny. A decision to create an additional minority district in response to denial of preclearance will be equally race conscious no matter where in the State the district is created.

Thus, if a State may legitimately consider race in the reapportionment process for any of the reasons discussed supra, the choice of the actual districts themselves should be subjected only to the deference traditionally applied to claims of partisan gerrymanders. As this Court has often noted, "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power . . . in accordance with . . . voting strength and, within quite tolerable limits, succeeds in doing so." Gaffney v. Cummings, 412 U.S. 735, 754 (1973). See also Carey, 430 U.S. at 168; Davis v. Bandemer, 478 U.S. at 135 ("Relying on a single election to prove unconstitutional discrimination is unsatisfactory"). Indeed, in demanding judicial review for "compactness" and other purported neutral districting criteria, Amicus RNC seeks constitutional stat-

ure for criteria this Court has steadfastly refused to elevate to such heights. See Gaffney, 412 U.S. at 752 n.18 ("compactness or attractiveness have never been held to constitute an independent federal constitutional requirement").

That is not to say that a State may hide behind the Voting Rights Act to defend an unconstitutional partisan gerrymander. Nonetheless, the two types of claims, though similar, must be treated separately. A plaintiff who brings a racial gerrymandering case must prove a violation under whatever standard this Court decides should apply. A plaintiff who claims that race is being used for partisan purposes is nonetheless bringing a political gerrymandering claim.29 The injury alleged is not based on plaintiff's membership in a racial group and the State's intent to harm that group or benefit another racial group; rather the injury is one to a political or other group and is derived from the State's intent to diminish that group's political power. Race is simply irrelevant to the claim, and should not trigger more exacting scrutiny than would otherwise apply to a claim of partisan gerrymander.30

The failure to respect this critical distinction would be devastating to core notions of federalism and comity.

<sup>&</sup>lt;sup>29</sup> Plaintiffs in this case bring a racial gerrymandering claim, albeit one under the Fourteenth Amendment Amicus RNC attempts to transform this case into a partisan gerrymandering case. This case, however, is about the use of race, not the use of political party affiliation. Furthermore, this Court has already affirmed the dismissal of the Republicans' "partisan gerrymandering" challenge to North Carolina's reapportionment plan in Pope v. Blue, 113 S. Ct. 30 (1992).

<sup>&</sup>lt;sup>30</sup> If it is alleged that one effect of a political gerrymander is the dilution of minority voting strength, then that allegation might be subject to stricter scrutiny. See Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991). However, no such allegation has been made in this case because the alleged partisan gerrymander did not dilute the voting strength of a suspect class.

State legislatures—not federal courts—are charged with establishing the policies to be incorporated into redistricting plans: "'redistricting and reapportioning legislative bodies is a legislative task which federal courts should make every effort not to pre-empt'." McDaniel v. Sanchez, 452 U.S. 130, 150 n.30 (1981) (quoting Wise v. Lipscomb, 437 U.S. 535, 539 (1978)). See also Chapman v. Meier, 420 U.S. 1, 27 (1975) ("reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court").

Absent a violation of a constitutionally mandated requirement, a court may not trench upon this state power. To permit a district court to apply "neutral principles" would "[i]nvite attack on minor departures from some supposed norm [and] would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from the legislative halls." Davis v. Bandemer, 478 U.S. at 133 (plurality opinion) (White, J.). Courts must be reluctant to undertake "the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." Id. at 153 (O'Connor, J. joined by Burger, C.J. and Rehnquist, J. (now C.J.)) (quoting Gaffney v. Cummings, 412 U.S. at 754). Amicus RNC's proposal invites federal courts to "become bogged down in a vast, intractable apportionment slough." Gaffney v. Cummings, 412 U.S. at 750; see also Davis v. Bandemer, 478 U.S. at 144 (O'Connor, J., concurring in the judgment) (arguing that partisan gerrymandering is a non-justiciable political question). The invitation should be refused.

# IV. THE RESOLUTION OF THIS CASE SHOULD NOT AFFECT THE DISPOSITION OF WETHERELL V. DE GRANDY.

Amici also respectfully suggest that resolution of the issues presented here should have no bearing on the proper resolution of Wetherell v. De Grandy, No. 92-519. That is so for several reasons.

First, there is no allegation in Wetherell v. De Grandy that the State of Floirda violated the Fourteenth Amendment by taking race into account. To the contrary, the allegations are that the House reapportionment plan at issue, SJR 2-G, was insufficiently race conscious because it failed to create additional Hispanic house districts that could have been created.

Second, unlike Voinovich, there is no allegation in Wetherell v. De Grandy that the creation of Dade County districts in which Hispanic citizens could elect preferred candidates was unnecessary to comply with the Voting Rights Act, as construed in Gingles. To the contrary, the findings of the district court in Wetherell v. De Grandy demonstrate that the State of Florida did have a compelling interest in considering minority interests because Dade County is characterized by racially polarized voting and Hispanic citizens in Dade County are politically cohesive. See Wetherell, Civ. No. 92-40015, slip op. at 19 (N.D. Fla. July 17, 1992) (three-judge court) (applying Thornburg v. Gingles), probable jurisdiction noted, Feb. 22, 1993, appeal pending, No. 92-519.

Third, there is no allegation in Wetherell v. De Grandy that the districts created in the State's reapportionment plan departed so far from purported "neutral districting criteria" as to raise issues of the kind identified in this case by Amicus RNC. To the contrary, the plaintiffs in Wetherell merely alleged that the districts in their proposed alternative reapportionment plan were not worse than the districts in the state plan in terms of compactness. The district court specifically did "not find

that the districts drawn by the [] plaintiffs [were] significantly less geographically compact than those drawn by the state of Florida." *Id.*, slip op. at 34. Thus, even if *Amicus* RNC's untenable standards are adopted, there can be no claim that the districts in the state plan at issue in *Wetherell* violated those standards.

## CONCLUSION

The judgment of the district court in Shaw v. Gerson should be affirmed.

Respectfully submitted,

Donald B. Verrilli, Jr.\* Scott A. Sinder Thomas J. Perrelli Jenner & Block 601 Thirteenth Street, N.W. Washington, D.C. 20005 (202) 639-6000

KEVIN X. CROWLEY
JAMES A. PETERS
COBB, COLE & BELL
131 North Gadsden Street
Tallahassee, Florida 32301
(904) 681-3233
Counsel for Amici Curiae

<sup>\*</sup> Counsel of Record

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#### IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Appellants,

V

WILLIAM P. BARR, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

INTEREST OF AMICUS CURIAE'

The NAACP Legal Defense and Educational Fund, Inc. ("the Fund") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." NAACP v. Button, 371 U.S.

Letters consenting to the filing of this brief have been filed with the Clerk of Court.

415, 422 (1963). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. See, e.g., Houston Lawyers Ass'n v. Attorney General of Texas, 111 S.Ct. 2376 (1991); Chisom v. Roemer, 111 S.Ct. 2354 (1991); Thornburg v. Gingles, 478 U.S. 30 (1986); United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

#### SUMMARY OF ARGUMENT

This case raises critically important issues about the scope of a state's authority to remedy race-based voting discrimination to comply with the Voting Rights Act, 42 U.S.C. §1973, as amended in 1982. At the outset, however, it is important to clarify what this case is not about. This case does not present a question about the State's failure to comply with a remedial directive by the Attorney General. There is no dispute that the state action challenged by appellants was taken at the suggestion of the United States Attorney General and was subsequently approved by the Attorney General. Letter from Assistant United States Attorney General for Civil Rights, John Dunne, to Tiare B. Smiley, North Carolina Special Deputy Attorney General, of 2/6/92 at 2.

The question raised by this case is whether a state constitutionally may use race-conscious measures to preserve minority voting strength. Under this Court's decisions in United Jewish Organizations v. Carey, 430 U.S. 144 (1977)("UJO") South Carolina v. Katzenbach, 383 U.S. 301 (1966); City of Rome v. United States, 446 U.S. 156 (1980); City of Richmond v. United States, 422 U.S. 358 (1975) and United States v. Beer, 425 U.S. 130 (1976), a state unquestionably can. These cases were correctly decided and govern the disposition of this case, requiring affirmance of the judgment below.

In reality, redistricting cannot be "race-neutral". By its very nature, drawing lines to allocate political power requires classification of people according to group characteristics, whether social, political, economic or racial. Those who draw political boundaries inevitably are aware of, and take into account, the race and other demographic characteristics of their constituents.

The core principles enunciated in UIO and the other cases cited above have continuing validity. As long as it does not use race invidiously to cancel out the voting strength of nonminority groups, a state constitutionally may act to ensure equal electoral opportunity for minority voters by creating districts in which they constitute the majority of the voting age population ("majority minority districts"). Such actions by the state are not prohibited by, and in fact are wholly consistent with, the critical national policy, as expressed in the Voting Rights Act, of eradicating race-based voting discrimination. The Court's recent decisions involving race-conscious measures do not require a different result.

Because of the statutory single-member district requirement for congressional elections, the only way to effectuate the equal participation guarantees of the fourteenth and fifteenth amendments in the context of congressional elections is through the creation of majority minority districts. Moreover, there is no cognizable harm suffered by nonminority group members included within fairly drawn majority minority districts.

A prohibition against considering race in redistricting, while permitting the consideration of a host of other factors, would itself violate the fourteenth and fifteenth amendments. Such a prohibition would impose substantial and unique burdens on racial minorities in the redistricting process and would inhibit their ability to have a fair opportunity to elect representatives of their choice.

<sup>1</sup>See 2 U.S.C.A. §2c.

#### ARGUMENT

#### Introduction

For nearly one hundred years, African American voters had no opportunity to participate equally in the political process and no African American was elected to Congress from the State of North Carolina. In 1992, following the decennial reapportionment and the creation of two majority African American congressional districts, North Carolina sent its first two African American representatives since Reconstruction to Congress. The reapportionment plan that created these two districts is at issue in this case.

North Carolina has a long history of racial discrimination in voting. It was the subject of the landmark decision, *Thomburg v. Gingles*, 478 U.S. 30 (1986), in which this Court upheld findings of extreme racial bloc voting and vote dilution in the State's legislative districts.

After a finding that the State had used racially discriminatory voting tests and devices leading to depressed minority voter registration and participation levels, forty of North Carolina's one hundred counties were designated for preclearance under section 4(e) of the Voting Rights Act. As a "covered jurisdiction", North Carolina was required to submit its congressional reapportionment plan to the United states Attorney General for preclearance.

The congressional reapportionment plan originally submitted by the state contained one majority African American congressional district. A-3a.<sup>2</sup> The Attorney General lodged a section 5 objection to this plan because it was dilutive of African American voting strength, noting that state authorities could have created an additional majority minority district. As evidence of this conclusion, the

Attorney General noted that it would have been possible to draw an additional combined majority African American and Native American district in the Southeastern portion of the state. Acting to cure the section 5 objection, the North Carolina General Assembly drew another reapportionment plan that contained a majority African American district in the center of the state. A-4a.

This brief will not address in detail the particular facts and circumstances of the North Carolina case. Nor will it discuss a covered state's duty under the Voting Rights Act once the Attorney General has found that the state's congressional reapportionment plan violates section 5. Amicus takes the position that once a covered state's reapportionment plan is found to be in violation of section 5, the state must remedy the violation. In its attempt to purge itself of the objection, the state enjoys great latitude. Neither the language of the statute, see 42 U.S.C. §1973c, the Attorney General's section 5 regulations, see 28 C.F.R. 51.44, nor case law, see Wise v. Lipscomb, 437 U.S. 535-41 (1978); Connor v. Finch, 431 U.S. 407, 414-415 (1977) and Reynolds v. Sims, 377 U.S. 533, 586 (1964) requires a state to adhere specifically to any particular remedial plan. In reviewing the state's remedial plan, the Attorney General's inquiry is limited to whether the plan cures the basis for the objection, not whether the state adopted one or another remedy proposed in the Attorney General's comments.3 As long as the state's remedial plan corrects the violation without fencing nonminority groups out of the political process, it passes muster under the Voting Rights Act and the Constitution. Indeed, under the decisions of this Court,

<sup>&</sup>lt;sup>2</sup>See Shaw v. Barr, C.A. No. 92-202-Civ-5-BR, slip op. at 13a (E.D.N.C. Aug. 7, 1992). The trial court opinion, from which most of this factual discussion is drawn, is found in the Appendix to Appellants' Jurisdictional Statement. (U.S. App.)

<sup>&</sup>lt;sup>3</sup>Indeed, in this case, the Attorney General's objection letter does no more than identify, as evidence of discrimination, one possible alternative to the configuration adopted by the state that included two districts. Nowhere does the letter suggest that the Attorney General intended to require adoption of the particular district that was identified in the objection letter. And indeed, the Attorney General approved the second plan which did not contain the referenced district.

even in the absence of a violation, a state may act voluntarily to avoid dilution of minority voting strength. *UJO*, 430 U.S. 144.

We address here the argument made by petitioner and some of their amici that previously settled law should be changed - specifically, that the Constitution requires what they call "race-neutral" districting and that UJO v. Carey should be overruled.

- I. APPELLANTS' PROPOSED REQUIREMENT OF "RACE-NEUTRAL" DISTRICTING IS INCAPABLE OF REALIZATION
  - A. Legislatures Cannot Draw Electoral Districts
    Without Taking Race Into Account

The term "race-conscious districting" purports to describe the process whereby minority voters are aggregated into majority minority districts to create an opportunity for these voters to elect a preferred candidate. When the election system in a jurisdiction is arranged to include some districts in which the minority group predominates, the racial majority group in the jurisdiction cannot control the election of all representatives as it would if elections were conducted at-large in a winner take all system, or solely in districts in which the majority predominated. See Guinier, "The Representation of Minority Interests: The Question of Single Member Districts," 14 Cardozo L. Rev. 1001 (1993).

However, the term "race-conscious" is misleading in that it falsely suggests that there is such a thing as "race-neutral" districting. Appellants' proposed requirement of "race neutral" districting is incapable of realization and would mask the practice of discriminating against racial minorities in the districting process.

By its very nature, redistricting is the process of aggregating people according to their group characteristics,

whether geographic, economic, social or racial. In addition, the Constitution requires that districts be substantially equal in population. It is inevitable that in the process of devising districts, a host of political or "nonneutral" considerations will affect how boundaries will be drawn. In deciding where to place the district lines, legislators decide which of several possible groups will constitute the district majority, and thus control the district. In so doing, legislators make decisions about which incumbents will be protected, which political parties will be advantaged, which political groups will be given a voice, and which communities will be advantaged by being allowed to remain whole. Karcher v. Daggett, 462 U.S. 725 (1983); Gaffney v. Cummings, 412 U.S. 735 (1973). Invariably, such decisions have obvious racial consequences to which legislators cannot close their eyes. UJO, 430 U.S. at 176 (Brennan, J. concurring). Three factors support this conclusion.

First, census data must be used to meet constitutional equal population standards. This data is full of explicit racial information. Moreover, computer technology makes it possible to analyze the racial and political impact of each possible redistricting choice in considerable detail in very short periods of time. Karcher, 462 U.S. at 752, n.10 (Stevens, J., concurring). Under these circumstances, to pretend that legislators and legislative staffs are unaware of race or national origin when they district is to wink at reality. Cf., Alexander v. Louisiana, 405 U.S. 625 (1972); Castenada v. Partida, 430 U.S. 482 (1977)(presence of data showing race or national origin sufficient to infer that information taken into account).

Second, even if racial considerations are not explicit in the districting process, there are a myriad of proxies for racial data. Minorities often are residentially segregated and share socioeconomic characteristics that define their political interests. Because of residential segregation, the precincts and wards that are the building blocs of districts often have

clearly identifiable racial characteristics. See Wright v. Rockefeller, 376 U.S. 52 (1964). In addition to residential patterns and income, other proxies such as traditional physical barriers (such as the railroad tracks customarily found in segregated communities), and in some instances, party affiliation may be used in the districting. The existence of these proxies for race make it implausible that racial considerations will not enter the districting process either directly or indirectly. A rule that requires legislators to ignore racial considerations while taking into account any other social, political, economic and geographic attribute of minority groups ignores plain reality. Imposing such a rule would not remove racial considerations from the districting process, it simply would prevent legislators from affirmatively acting to protect minority interests in the electoral sphere.

Third, redistricting largely is driven by incumbents. Davis v. Bandemer, 478 U.S. 109, 147 (1986), (O'Connor, J., dissenting); Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991). In the context of congressional reapportionment, where incumbent state legislators draw the congressional districts, a primary motivation is maximizing the legislative influence of their parties by increasing, to the extent possible, the election prospects of fellow partisans. See Davis, supra. Given the known nationwide patterns of racially polarized voting<sup>5</sup> and

high level of loyalty to the Democratic Party among African Americans, in many jurisdictions, see e.g., Whitcomb v. Chavis, 403 U.S. 124 (1971), it is likely that these incumbents will closely consider the impact of their line-drawing on the racial composition of their districts. Even if incumbents do not monitor the racial impact of line-drawing, but merely seek to preserve the core of their constituencies, there is likely to be a racial impact given segregated housing patterns.

B. A "Race-Neutral" Districting Requirement
Would Conflict with Well-Established Principles
in Reapportionment Cases and Would be
Inconsistent with the Voting Rights Act

This Court consistently has recognized in its jurisprudence after Reynolds v. Sims, 377 U.S. 533 (1964), that state legislatures must be given room within one-person, one-vote parameters to consider and advance a variety of political and policy goals. Brown v. Thomson, 462 U.S. 835 (1983); Abate v. Mundt, 403 U.S. 182 (1971); Mahan v. Howell, 410 U.S. 315 (1973); Gaffney v. Cummings. 412 US 735 (1973); Growe v. Emison, No. 91-1420, 1993 WL 42842 (U.S. Minn. Feb 23, 1993), 1993)(slip op. pp.7-8). See also, Wright v. Rockefeller, 376 U.S. 52 (pre-Reynolds). Requiring the kind of highly antiseptic districting process that would be necessary to insure that racial information was not taken into account, either directly or indirectly, would unavoidably restrict legislative bodies' ability to implement these other kinds of policies. Indeed, if appellants' "race-neutral"

<sup>&</sup>lt;sup>4</sup>[L]ike bloc-voting by race, this too is a fact of life, well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district." Beer v. United States, 425 U.S. 130, 144 (1976)(White, J., dissenting).

See Beer v. United States, 425 U.S. at 144 (White, J., dissenting); Thornburg v. Gingles, 478 U.S. 30 (1986); see also, Gomez v. City of Watsonville, 863 F.2d 1407, 1417 (9th Cir. 1988); Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987), cert. denied, 492 U.S. 905 (1989); Ewing v. Monroe County, 740 F. Supp. 417, 421 (N.D. Miss. 1990); Jeffers v. Clinton, 730 F. Supp. 196, 198 (E.D. Ark. 1989); aff d, 111 S Ct. 662 (1991); Brown v. Boara of Commissioners

of Chattanooga, 722 F. Supp. 380, 393 (E.D. Tenn. 1989); Clark v. Edwards, 725 F. Supp. 285, 298-99 (M.D. La. 1988), vacated sub nom. Clark v. Roemer, 750 F. Supp. 200 (M.D. La. 1990), vacated and remanded, 111 S. Ct. 2881 (1991); McDaniels v. Mehfoud, 702 F. Supp. 588, 593-94 (E.D. Va. 1988); Martin v. Allain, 658 F. Supp. 1183, 1193-94 (S.D. Miss. 1987); McNeil v. City of Springfield, 658 F. Supp. 1015, 1028 (C.D. Ill. 1987).

districting approach is adopted, the only way legislatures will be able to draw plans immune from challenge is to completely remove themselves from the process and engage in computer-controlled, mathematical redistricting. Such a practice undoubtedly would run afoul of the clear Reynolds principle that districting is primarily a political and legislative process. Reynolds, 377 U.S. at 586.

For a variety of reasons, districts drawn to meet purely mathematical or "objective" criteria with no regard for racial or political impact are not a desired goal. See Whitcomb, 403 U.S. 124; White v. Weiser, 412 U.S. 783, 794-795 (1973). Such a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results." Gaffney v. Cummings, 412 U.S. at 753. Similarly, a purportedly racially mindless approach will likely result in only whites being represented. Alternatively, a purely mathematical formulation would require a state to adopt a series of district plans at random without regard to whether the lines minimize minority voting strength until it stumbles across a plan that does not have this illegal effect.

A test which would require legislators to act with complete indifference to the impact of districting on cognizable groups of voters is simply much too strict. It should either open the door to invalidation of all apportionment plans or require legislators to perform ridiculous charades in their public deliberations and to do their only significant work in private conference.

466 F. 2d 847, 856 (7th Cir. 1972) (Stevens, J., dissenting).

Indeed, a rule that would require each state to engage in a haphazard redistricting approach that did not take race into account, only to be sued later, would frustrate the unequivocal intent of Congress embodied in the Voting Rights Act. In passing the Act, Congress rejected, as wholly ineffective, piecemeal litigation to enforce constitutional voting guarantees. South Carolina v. Katzenbach, 383 U.S. at 313. Such enforcement strategies were seen as "unusually onerous," "exceedingly slow," and inconsistent with the urgent national priority to end racial discrimination in voting once and for all. Id., at 314. It is completely consistent with this congressional policy to allow states voluntarily to create majority minority districts in order to comply with the requirements of the Act.

Finally, even if the districting process were left solely to the computers, courts would be required to closely scrutinize the instructions given to the computer regarding factors to consider in drawing lines to insure that neither race nor racial proxies entered into the picture. What petitioners really propose is a mechanical rule that as long as race is not explicitly identified as a factor in the districting process, and no majority minority subdistrict is created within an otherwise majority white jurisdiction, discrimination has not occurred. Such a rule would usher in a return to the era of "sophisticated, [not] simple-minded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 279 (1939).

- II. APPELLANTS' "RACE NEUTRAL" DISTRICTING
  APPROACH IS INCONSISTENT WITH THE VOTING
  RIGHTS ACT
  - A. Section 5 of the Act Requires Race-Conscious Districting.

To effect compliance with Section 5 of the Act, a state must take race into account in the districting process. This Court's decisions consistently have recognized this simple principle. In Beer v. United States, 425 U.S. 130

<sup>&</sup>lt;sup>6</sup>Indeed, application of such a "mindless" approach in a state like North Carolina, with a history of voting discrimination, will as often as not result in only whites being represented.

<sup>&</sup>lt;sup>7</sup>As (then) Circuit Judge Stevens observed in Cousins v. City Council of the City of Chicago:

(1976), the Court established an "effects" test under section 5 that required covered jurisdictions to reject reapportionment plans that "[w]ould lead to a retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise." Beer, 425 U.S. at 141. Similarly, in Allen v. State Board of Elections, 393 U.S. 544 (1969), the Court held that Section 5 scrutiny applied to a change from a district to an at-large system of election to ensure that minority voting strength was not diluted. 393 U.S. at 569.

In City of Richmond v. United States, 422 U.S. 358 (1975), the Court held that in order to avoid a violation of section 5, the City of Richmond was required to assess African American voting strength and develop a plan that fairly reflected that strength in the enlarged community following annexation. Richmond, 422 U.S. at 371 In Richmond, compliance with section 5 necessitated consideration of race and the impact on minority voting strength of proposed political boundary changes in the annexation process and affirmative action to ensure against dilution of minority voting strength. Failure to assess and fairly reflect the electoral strength of African Americans in the postannexation community would have created a violation. Id.

Also, in City of Rome v. United States, 446 U.S. 156 (1980), this Court concluded that annexations undertaken by the city violated Section 5 because "[b]y substantially enlarging the city's number of white eligible voters without creating a corresponding increase in the number of Negroes, the annexations reduced the importance of the votes of Negro citizens who resided within the preannexation boundaries of the city." City of Rome, 446 U.S. at 187. Underscoring the need for a jurisdiction to take race into account in changing its political boundaries, the Court held that the jurisdiction's lack of detailed information on the racial breakdown of city population left the city with no defense against a charge that the annexations violated Section 5. Id. at 186.

Implicit in each of these rulings is the proposition that compliance with the Voting Rights Act necessarily requires that racial considerations be examined and employed to ensure that minorities be afforded the opportunity to participate and elect their candidates of choice.

Congress was well aware that compliance with Section 5 necessarily would require a state to consider race in reapportioning its districts. In amending the Act in 1982, Congress specifically endorsed the Section 5 retrogression standard of Beer v. United States, with its implicit requirement of race consciousness in evaluating the impact of political boundary changes. Id. Congress also cited the continued gerrymandering of election boundaries to exclude African Americans from the political process as a basis for extending section 5. S. Rep. No. 97-417, 97th Cong., 2d Sess. 6 (1982) ("S. Rep."). Indeed, Congress expressly noted that "[t]he continuing problem with reapportionments is one of the major concerns of the Voting Rights Act." Id. at 12 n.31.

# B. Section 2 of the Act Requires Race Conscious Districting.

Even in non-covered jurisdictions, racial data must be considered in districting because of the "effects" test adopted in the 1982 amendments to section 2. In 1982, Congress adopted the vote dilution analysis set out in White v. Regester, 412 U.S. 755 (1973) and Zimmer v. McKeithen 485 F.2d 1297 (5th Cir. 1973) expressly identifying racially polarized voting as a key factor in establishing a vote dilution claim. S. Rep. at 29. In Thomburg v. Gingles, 478 U.S. 30, interpreting the 1982 amendment to section 2, the Court identified: a) the existence of a minority group that is b) politically cohesive and sufficiently large and geographically compact as two of the three preconditions for

a finding of vote dilution under the Act. 478 U.S. at 48<sup>8</sup> This test requires states engaging in redistricting to consider, among other factors, the voting strength and the size and geographic concentration of minority groups in order to avoid violating section 2.

Compliance with section 2 necessarily requires states to explicitly consider race in districting matters. If they are prevented from considering racial data in the process they will be left vulnerable to attack under section 2. Such a result is fundamentally inconsistent with congressional intent. In amending section 2, Congress took into account, and rejected as unfounded, concerns raised by the Act's detractors that imposing an affirmative obligation on government to secure minority voting rights by raceconscious mechanisms was alien to this country's political tradition. See Gingles v. Edminston, 590 F. Supp. 345, 356-57 (E.D.N.C. 1984), aff'd, Thomburg v. Gingles, 478 U.S. 30 (citing Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1351-54 (Feb. 12, 1982) (statement of Professor Blumstein), p. 509-10 (Jan. 28, 1982) (statement of Professor Erler), p. 231 (Jan. 27, 1982) (testimony of Professor Berns). In doing so, Congress made it inevitable that states voluntarily will use race-conscious measures to secure compliance with section 2.

## C. The Disclaimer on Proportional Representation Does Not Limit Black Electors' Opportunity.

Appellants' argument that majority minority districts were created to ensure the election of a "quota" of minority representatives in violation of the Act's proportional representation disclaimer, wholly misunderstands the law. The Act's disclaimer provides that "nothing in this section

establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. This language focuses not on the minority voter, but on the election of minority individuals to office. By its plain language, the provision is a disavowal of election "quotas" for minority candidates. 42 U.S.C. Section 1973b See S. Rep. at 30-31 (The disclaimer provision is "both clear and straightforward. . . . It puts to rest any concerns that have been voiced about electoral quotas).

The language of this provision is consistent with the Act's focus on providing the opportunity for minority voters to participate and elect their candidates of choice, not on guaranteeing the election of a particular number of the "members of a protected class." Id.; S. Rep. at 28; Gingles, 478 U.S. at 46. The creation of majority minority districts in proportion equal to the minority proportion of the population is not inconsistent with this provision. However, even the creation of such districts does not guarantee the election of minority representatives. Indeed, the only guarantee afforded minority voters is that they be given the opportunity to elect a candidate who is actually accountable to them-because she is dependent on them for their votes-regardless of color. Cf. Rogers v. Lodge, 458 U.S. 613, 623 (1988)(Racially polarized voting in an unfair electoral system allows elected officials to ignore the interests of minority constituents without repercussions).

The creation of two majority African American congressional districts out of twelve in the particular case of North Carolina does not violate the Voting Rights Act's disclaimer of guaranteed proportional representation. From a purely mathematical standpoint, African Americans do not enjoy absolute proportional representation. African Americans constitute 22% of the population of North Carolina, but have the opportunity to elect their candidates of choice in two of twelve districts, or 16.6% of the districts. Since whites are a majority in 83.4% of the districts, whites are in fact overrepresented with respect to their percentage of the state's population. The creation of two majority

<sup>&</sup>lt;sup>8</sup>Indeed, in Gingles this Court stated that one of the two most important factors bearing on Section 2 challenges is the existence of racially polarized voting. 478 U.S. at 48 n.15.

African American districts out of a total of twelve does not violate the Voting Rights Act's disclaimer on proportional representation.

III. APPELLANTS' "RACE NEUTRAL" APPROACH TO REDISTRICTING IS NOT REQUIRED BY APPLICABLE CONSTITUTIONAL PRINCIPLES

A State voluntarily may use "race-conscious" measures to comply with statutory and constitutional voting guarantees and avoid abridgement of minority voting strength. UJO, 430 U.S. 144. Unless the districts are "conceived or operated as purposeful devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population," no constitutional injury results. Rogers v. Lodge, 458 U.S. at 617 (internal quotation marks omitted). See Gomillion v. Lightfoot, 364 U.S. 339 (1960). The cases decided since UJO, in which this Court has struck down race-conscious remedies, are inapplicable in the context of redistricting, and thus have no impact on UJO. City of Richmond v. Croson, 488 U.S. 469 (1989); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980).

In its Equal Protection jurisprudence this Court has looked at two factors in determining the permissibility of racial considerations--the strength of the State's justification for using race-conscious measures, and the nature and extent of the burdens imposed on individuals affected by the measures. Both factors support the constitutionality of taking race into account in the districting process.

A. The State's Interest In Complying with the Voting Rights Act

The Court consistently has held that overcoming the effects of past discrimination and avoiding current discrimination are sufficient governmental justifications for the employment of racial considerations. See Swann v.

Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971); McDaniel v. Barresi, 402 U.S. 39 (1971); UJO, supra. Where federal law creates a duty not to discriminate, the weight of this interest may be greater.

In the context of districting, the comprehensive remedial scheme under sections 5 and 2 of the Act creates a powerful justification for the use of race-conscious remedies. This justification arises out of the extensive findings of Congress, as recently as 1982, that racial discrimination in voting is a persistent evil that is national in scope and that ending this abridgement of a fundamental right is a national priority. See South Carolina v. Katzenbach, 383 U.S. at 309.

Under section 5, a covered jurisdiction may not implement any electoral change, no matter how small, unless it can prove that the change will not discriminate against minority voters. Allen v. State Board of Elections, 393 U.S. at 566. This shift in the burden of proof was a clear expression of Congress's intent to ensure that no new voting mechanisms be used to perpetuate past discrimination. This policy alone creates a vital state interest in using race conscious measures to avoid a violation of section 5. Similarly, states not covered by section 5 have a strong interest in avoiding violation of section 2. The only way to avoid this risk is by being cognizant of race and assuring minority electors a fair opportunity to elect candidates of their choice.

<sup>&</sup>lt;sup>9</sup>Yick Wo v. Hopkins, 118 U.S. 356 (1886); Reynolds v. Sims, 377 U.S. at 555, 561-562 ("[T]he right of suffrage is a fundamental matter in a free and democratic society. . . . the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); Mobile v. Bolden, 446 U.S. 55, 104-105 (1980), (Marshall, J. dissenting); Rogers v. Lodge, 458 U.S. 613 (1982).

This Court has upheld Congress's authority under the fourteenth and fifteenth amendments to adopt "prophylactic rules" and induce states to avoid conduct it has defined as unlawful. E.g., Croson 488 U.S. at 490 (citing Katzenbach v. Morgan, 384 U.S. 641; South Carolina v. Katzenbach, 383 U.S. 301. Thus, specifically in the context of redistricting, a state can "take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination." Wygant, 476 U.S. at 291 (O'Connor, concurring)(citing UIO). See also, Metromedia Broadcasting v. Federal Communications Comm., 497 U.S. \_\_\_\_, \_\_\_, 111 L. Ed. 2d 445, 473 (1990) (affirming that neither the fifteenth nor the fourteenth amendment "mandates any per se rule against using racial factors in districting and apportionment.")(citing UIO v. Carey).

B. The Creation of Majority Minority Districts
Does Not Impose A Constitutionally Forbidden
Burden on White Voters

The nature and extent of the "burden" imposed on white voters affected by the creation of majority minority districts does not violate equal protection concepts. As long as the state does not use race systematically to exclude white voters from the political process, white voters assigned to majority minority voting districts are not subject to any cognizable harm. There is no allegation in this case that white voters systematically are excluded from the political process.

The "burden" imposed on whites within majority white districts is not akin to the burdens created by the race-conscious allocation of resources that has elsewhere concerned this Court. For example, in Wygant, before striking down the preferential layoff policy, the Court likened white workers' expectation in job security to the value of equity in a house. It highlighted the likely disruption of this expectations in job security, noting that "layoffs impose the entire burden of achieving racial equality

on particular individuals, often resulting in serious disruption of their lives"10;

Similarly, in *Croson*, the Court highlighted the fact that minority contractors from anywhere in the country would receive preference over whites from the City of Richmond. ("Under Richmond's [minority set-aside] scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race") *Croson*, 488 U.S. at 508; *See also*; *Metromedia*, 111 L.Ed.2d at 475 (O'Connor, J. dissenting) ("The distress sale imposes a particularly significant burden. The FCC has at base created a specialized market [for broadcast licenses] reserved exclusively for minority controlled applicants. There is no more rigid quota than a 100% set-aside.")

In contrast, "race-conscious" districting does not allocate representation in a way that unfairly burdens white voters. White voters who are assigned to majority minority districts are not deprived of the right to vote, nor is the weight of their individual votes arbitrarily debased or diluted in comparison to the votes of any other voters. Reynolds, 377 U.S. 533. No individual voter has the right to vote for a particular candidate, nor does a voter have a constitutional claim if her candidate loses at the polls. Whitcomb v. Chavis, 403 U.S. at 153-154. In fact, the individual voter has no claim even if her candidate repeatedly loses--for example, when a Republican happens to live in majority Democratic district, Cf. Davis v. Bandemer, 478 U.S. at 109, or her party suffers crushing defeat statewide at the polls. Id., at 138-140; Whitcomb, 403 U.S. at 154.

The white voter who is assigned to a majority minority district is in no worse a position than the minority

<sup>&</sup>lt;sup>10</sup>In Johnson v. Transportation Agency, 480 U.S. 616 (1987), on the other hand, the Court upheld an affirmative action plan because it was deemed not to frustrate the much lower expectation in being hired.

voter who is in a majority white district, or for that matter, the Democrat in a Republican district, even though their electoral choices may regularly be defeated. To the extent that the vote of an individual white voter within a majority minority district has been submerged, her complaint actually is with the system of districting itself. Districting is a compromise between at-large systems in which the majority controls 100% of the political power, and proportional representation systems where voters are allowed to form their own constituencies. 11 See Whitcomb v. Chavis, 403 U.S. at 146-147; Davis v. Bandemer, 478 U.S. at 159 (O'Connor, J., dissenting). Submergence is inevitable in winner-take-all district systems because districts enhance the power of the majority, Whitcomb v. Chavis, 403 U.S. at 153, regardless of its race. In a system where there are only winners and losers, there is no way to moderate that power. Davis v. Bandemer, 478 U.S. at 159 (O'Connor, J., dissenting).

Appellants themselves readily concede that white voters have no cognizable claim to group representation as white voters. Brief of Appellants at 27, see UJO, 430 U.S. at 144; White v. Regester, 412 U.S. 755 (1973); Whitcomb v.

Chavis, 403 U.S. at 124. Unless the election system is "arranged in a manner that will consistently degrade a voter's or a group of voter's influence on the political process as a whole," whites have no constitutional claim of voting discrimination. Davis v. Bandemer, 478 U.S. at 142-143; UJO, 430 U.S at 144, 165 (no cognizable claim where no "fencing out of the white population from participation in the political processes . . . and the plan did not minimize or unfairly cancel out white voting strength.").

In North Carolina, there was no claim that white voters have not been "fenced out from participation" in the political process. In fact, as we described above, white voters as a group still are overrepresented in the State as a whole. To the extent that voting and political concerns are racially polarized, the white voter within the majority minority district is "virtually represented" by, and may rely on, white representatives in other districts to protect her concerns. See UIO, 430 U.S at 171, n.1.

extirpated from the process of forming constituencies. In the districting context, legislators will make the race-conscious designations of electoral constituencies. Beer v. United States, 425 U.S. 130, 144 (1976), (White, J., dissenting). Under a system of proportional representation, the voters themselves will make race-conscious decisions about the constituency to which they belong. In an at-large, winner-take-all system, the voters' race conscious decisions may allocate power in a particularly invidious way. A racial majority in a racially polarized constituency will completely submerge the minority's choices and disproportionately enhance its own. Where this is true, this Court has invalidated winner-take-all at-large constituencies. See White v. Regester, 412 U.S. 755 (1973); Rogers v. Lodge, 458 U.S. 613 (1982); Thornburg v. Gingles, 478 U.S. 30.

<sup>&</sup>lt;sup>12</sup>The concept of virtual representation is not a formulation to console losing white voters. It is a cornerstone principle of winnertake-all district representation. Virtual representation is assumed on several levels within the system. Within the district, all voters, including those who did not vote for the winning candidate are "deemed to be adequately represented by the winning candidate," Davis v. Bandemer, 478 U.S. at 132. Even where voters expressly did not choose the winning candidate and even in a "safe" district where the losing group loses election after election, losing voters are deemed to have as much opportunity to influence the winning candidate as anyone else in the district. Id. Looking at the system as a whole, moreover, as long as no group is unfairly fenced out of the political process, losing voters in any district are believed to be adequately represented vicariously by representatives of like mind in nearby districts. See Guinier, 14 Cardozo L. Rev. 1001, supra. This assumption breaks down where minorities systematically have been excluded and voting is racially polarized.

IV. PROHIBITING RACE-CONSCIOUS REDISTRICTING WOULD BE INCONSISTENT WITH THE FOURTEENTH AMENDMENT.

We have explained above that the view that the process of creating congressional or other legislative districts can be objective and neutral is illusory. By the very nature of the districting process, it is inevitable that a host of political considerations will affect the decisions as to where and how lines will be drawn. Protecting incumbents, ensuring districts that are safe for one party or another, compromises designed to allocate political power between competing groups and protecting various constituent groups, are but a few of the influences, often wholly unrelated to or inconsistent with the creation of compact and contiguous districts, that play a role. Inevitably, in the balancing of the various interests at work the race of voter blocs will also be a factor, directly or indirectly through proxies such as income or residency.

Of course, the invidious use of race — to exclude a minority group from meaningful participation by submerging it in a majority white district — is prohibited both by the Constitution and by the Voting Rights Act. The issue in this case, however, is whether the Constitution bans any consideration of race in order to allocate fairly representation in a legislative body or delegation by affording minority voters a reasonable opportunity to elect representatives of their choice. To make racial blindness a legal requirement for redistricting decisions would itself be inconsistent with the fourteenth and fifteenth amendments.

Consider the following hypothetical: a state legislature or redistricting commission considers race along with many other factors and draws districts not to achieve "proportional representation" but, as in the present case, to afford minority voters a fair opportunity to elect representatives of their choice by creating some majority minority districts. Through the initiative process, a referendum is passed amending the state constitution so as

to prohibit "the consideration of race in the creation of electoral districts or the creation of electoral districts for the purpose of providing any racial group the opportunity of electing representatives of their choice." No other restrictions are placed on the factors that may be considered in constructing districts.

Under a number of decisions of this Court, such an enactment would violate the fourteenth amendment. In Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), this Court summarily affirmed, on the authority of Hunter v. Erickson, 393 U.S. 385 (1969), striking down a state statute that prohibited "assign[ing] or compell[ing] [students] to attend any school on account of race . . . or for the purpose of achieving [racial] equality in attendance . . . at any school." 318 F. Supp. at 712. See also, Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982)(state constitutional amendment requiring "neighborhood schools" with various exceptions unconstitutional since its purpose was to prohibit mandatory bussing for the purpose of ending racial isolation). Hunter itself held invalid a local ordinance that singled out fair housing laws for disfavored treatment compared to all other types of regulation of real estate transactions. See also, Reitman v. Mulkey, 387 U.S. 369 (1967).

The primary basis for these decisions was that the effect of the challenged laws was to "place special burdens on the ability of minority groups to achieve beneficial legislation." Washington v. Seattle School Dist. No. 1, 458 U.S. at 467. Thus, in Seattle School Dist. No. 1 and Lee v. Nyquist, the enactments did not require neighborhood schools as a neutral principal; rather they permitted school districts to deviate from neighborhood schools for a variety of reasons except for the purpose of assignment based on race to achieve integration. The ordinance in Hunter permitted persons seeking to regulate real estate transactions to obtain legislation from the Akron City Council; only if discrimination based on race was to be prohibited was voter approval required.

Similarly, in our hypothetical, the state would be permitted to take into account a variety of different factors in drawing district lines; only taking race into account for the purpose of giving minorities a fair opportunity to elect representatives of their choice would be prohibited. Just as in the cases above, the law "would not attemp[t] to allocate governmental power on the basis of any general principle." Hunter v. Erickson, 393 U.S. at 395. "Instead, it uses the racial nature of an issue to define the governmental decision making structure, and thus imposes substantial and unique burdens on racial minorities." Washington v. Seattle School District No. 1, 458 U.S. at 470.

If it would be a violation of the fourteenth and fifteenth amendments for a state to prohibit consideration of race in drawing district lines in order to achieve a fair allocation of electoral opportunity, then, we submit, those same amendments do not prohibit such consideration. As we have demonstrated above, white voters do not suffer any harm from the drawing of majority minority districts; whites have an opportunity to elect a disproportionate number of representatives of their choice, and no one has been denied the right to vote. The Constitution does not prohibit a state from voluntarily taking actions that take race into account to benefit minorities and, indeed, the body politic as a whole; therefore it does not prohibit a state from taking race into account to ensure a proper and fair distribution of political power. In the words of Justice Frankfurter: "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." Railway Mail Association v. Corsi, 326 U.S. 88, 98 (1945)(Frankfurter, J., concurring).

#### CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

ELAINE R. JONES
CHARLES STEPHEN RALSTON
\*DAYNA L. CUNNINGHAM
GAILON W. McGowen
NAACP Legal Defense
and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 219-1900

Attorneys for Amicus Curiae

\*Counsel of Record

No. 92-357

WIFICE OF THE CLERK

# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Appellants,

V

WILLIAM BARR, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. SENATOR JESSE HELMS, AND THE EQUAL OPPORTUNITY FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS

> DANIEL J. POPEO RICHARD A. SAMP (Counsel of Record) WASHINGTON LEGAL FOUNDATION 1705 N Street, NW Washington, DC 20036 (202) 857-0240

Date: January 21, 1993

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## QUESTION PRESENTED

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

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D. Polsby and R. Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale Law & Pol. Rev. 301 (1991)	20

#### IN THE SUPREME COURT OF THE UNITED STATES October Term, 1992

No. 92-357

RUTH O. SHAW, et al.,

Appellants,

V.

WILLIAM BARR, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. SENATOR JESSE HELMS, AND THE EQUAL OPPORTUNITY FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS

#### INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the ideal of a color-blind society in which the civil rights of all Americans are respected equally. To that end, WLF has appeared before this Court as well as other state and federal courts in cases raising important civil rights issues. See, e.g., Chisom v. Roemer,

111 S. Ct. 2354 (1991); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992).

Jesse Helms is a United States Senator from North Carolina. He is troubled by any congressional districting scheme for North Carolina that results in the unnecessary division of communities (and even precincts) into three or more separate congressional districts.

The Equal Opportunity Foundation is a nonprofit educational organization founded in 1986 dedicated to protecting the civil rights of all Americans. It does not believe that the cause of civil rights is advanced by creating electoral districts designed to ensure the election of members of particular racial or ethnic groups.

Amici believe that the people of North Carolina were ill-served by the congressional districting scheme being challenged in this case. Racial gerrymandering — by placing the state's stamp of approval on the notion that people of different races are inherently different from one another — is a giant step backward from our goal of a color-blind society. Nothing in the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 et seq., requires such gerrymandering. More importantly, the Constitution prohibits a state from treating its citizens (as did North Carolina in this case) merely as members of a particular racial group rather than as individuals.

Amici believe that their experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this case. Amici submit this brief on behalf of Appellants with the written consent of all parties. The written consents are on file with the Clerk of the Court.

#### STATEMENT OF FACTS

In the interests of judicial economy, amici hereby adopt by reference the Statement of the Case contained in Appellants' brief.

In brief, Appellants are five citizens of Durham County, North Carolina who object to the congressional districting plan adopted by the North Carolina legislature on January 24, 1992. The plan was expressly designed so that a significant majority of voters in two of the state's twelve congressional districts (the First and the Twelfth) are African Americans (hereinafter referred to as "majority-minority" districts). Three Appellants were placed into the Twelfth District, and two were placed into the Second District.

Some sort of redistricting scheme had been made necessary by North Carolina's substantial population growth during the 1980's, as measured by the 1990 Decennial Census. That growth entitled North Carolina to a twelfth seat in the U.S. House of Representatives, whereas it previously had had only 11 seats.

The General Assembly of North Carolina initially adopted a redistricting plan on July 9, 1991 that created one majority-minority district (the First District) in the northeastern part of the state. Because a portion of the state's counties are subject to the special provisions of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the state

Section 5 provides that any state or political subdivision with a history of abnormally low voter registration (as defined in 42 U.S.C. § 1973b(b)) must, before conducting elections that conform with a new redistricting scheme, obtain a declaratory judgment from the United States District Court for the District of Columbia that the redistricting scheme "does not have the effect of denying or abridging the right to vote on account of race or color." Section 5 further provides that the state or political subdivision need not obtain such a declaratory judgment if the redistricting scheme has been submitted to the U.S. Attorney General and the Attorney General has not objected thereto within 60 days.

Submitted the July 9, 1991 plan to the U.S. Attorney General for pre-clearance. Jurisdictional Statement Appendix ("Jur. App.") 3a.

The Attorney General interposed a timely objection to the July 9, 1991 plan. A December 18, 1991 letter from Assistant Attorney General John R. Dunne stated that the Attorney General objected to the plan because "the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear[s] to minimize minority voting strength given the significant minority population in this area of the state." Jur. App. 3a. The letter further stated that although the General Assembly was "well aware" of significant interest in creation of a second minority-majority district in the south-central to southeast portion of the state and although plans creating such a district had been presented to the General Assembly, it rejected such plans "for what appears to be pretextual reasons." Jur. App. 4a.

The General Assembly then adopted a new redistricting plan on January 24, 1992, the one at issue in this lawsuit (the "Plan"). Although the Plan created a second majority-minority district, it was not in the southcentral to southeast portion of the state (where the Attorney General had said that the first plan had improperly minimized minority voting strength) but (in the words of the district court) "in a thin band, sometimes no wider than Interstate Highway 85, some 160 miles long, snaking diagonally across piedmont North Carolina from Durham to Gastonia." Jur. App. 4a-5a. As a result of the "tortured configuration" of this new Twelfth District, "many precincts, counties, and towns in North Carolina are divided among two or even three congressional districts." Jur. App. 5a. The Attorney General did not object to the Plan.

Appellants filed suit on March 12, 1992, alleging that the Plan violated their rights under the U.S. Constitution. Appellants alleged that the First and Twelfth Districts had been drawn for the express purpose of creating majorityminority districts, and that no other rational explanation could be raised to support the drawing of such radically irregular district lines. Jur. App. 81a. Named defendants included not only state officials responsible for adopting and carrying out the Plan, but also federal officials who allegedly pressured the state officials into adopting the plan.

A three-judge panel of the United States District Court for the Eastern District of North Carolina dismissed the federal defendants for lack of subject matter jurisdiction. and dismissed the entire suit for failure to state a claim. Jur. App. 1a-25a. The district court held that this Court's decision in United Jewish Organizations, Inc. v. Carey ("UJO"), 430 U.S. 144 (1977), required dismissal because Appellants had not made two allegations central to any constitutional challenge: that the Plan "was adopted with the purpose and effect of discriminating against white voters such as plaintiffs on account of their race," and that it "has operated to 'fenc[e] out the white population of the [state, or either of the two challenged districts], [or to] minimize or unfairly cancel out white voting strength." Jur. App. 22a-23a (quoting UJO at 165 (plurality opinion)). Appellants filed this appeal from the dismissal pursuant to 28 U.S.C. § 1253.

#### SUMMARY OF ARGUMENT

The district court's dismissal of this lawsuit was based on a fundamental misunderstanding of this Court's decision in *United Jewish Organizations v. Carey ("UJO")*, 430 U.S. 144 (1977). That decision did not immunize from constitutional attack all redistricting plans adopted in an attempt to comply with the requirements of the Voting

The district court held that § 14(b) of the Voting Rights Act, 42 U.S.C. § 1973l, requires that challenges to federal government actions taken pursuant to § 5 of the Act may be brought only in the United States District Court for the District of Columbia. Jur. App. 9a. Amici do not take exception to that portion of the district court's holding.

Rights Act of 1965, 42 U.S.C. § 1973 et seq. Rather, the plurality decision in that case merely held that jurisdictions subject to § 5 of the Voting Rights Act may, when adopting voting-method changes such as redistricting plans, take race-conscious steps to ensure that adoption of the changes does not weaken the voting strength of disadvantaged racial groups. Thus, putting aside the fact that the North Carolina General Assembly was not pressured by the Attorney General into adopting the Plan, any desire that the General Assembly may have had to comply with the Voting Rights Act does not immunize the Plan from constitutional challenge. Moreover, the Voting Rights Act could not be more explicit in stating that the type of racial gerrymandering engaged in by the General Assembly for the purpose of achieving proportional representation by race is not required under § 2 of the Act.

Both the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment prohibit the racial gerrymandering that occurred in this case. The district court's conclusion to the contrary was based on the mistaken notion that constitutional injury is measured in terms of the overall effect that the challenged state action has on racial groups, rather than in terms of the effect of that action on the individual plaintiff.

#### ARGUMENT

I. THE ATTORNEY GENERAL'S CONDUCT DOES NOT PRECLUDE A FINDING THAT THE PLAN WAS ADOPTED WITH INVIDIOUS DISCRIMINATORY INTENT

The State Appellees argue that, as a matter of law, they may not be found to have acted with an invidious discriminatory intent in enacting the Plan, because the Plan was enacted in a good-faith attempt to comply with the directions of the Attorney General and the 'oting Rights Act. State Appellee's Motion to Affirm at 14-15. That argument is without merit because it simply does not square with the facts as alleged in this case.

As noted above, the Attorney General never gave any directions to North Carolina regarding how to comply with the Voting Rights Actor Rather, the Attorney General merely interposed an objection to the July 9, 1991 plan on the basis that it appeared "to minimize minority voting strength" in the south-central and southeast portions of the state, and suggested that the General Assembly's reasons for failing to create a majority-minority district in that portion of the state "appear[ed] to be pretextual." Jur. App. 3a-4a. Thus, the Attorney General cannot be said to have pressured the General Assembly into creating a second majority-minority district; the face of his letter suggests that he would have been satisfied for § 5 purposes if the General Assembly had provided a non-pretextual reason (such as, for example, a desire to create compact districts) for failing to create a second majority-minority district.

Moreover, to the extent that the Attorney General can be said to have given directions regarding how to comply with the Voting Rights Act, the General Assembly ignored them. Rather than creating a second majority-minority district in the south-central to southeast portion of the state (as the Attorney General's letter might be read as suggesting it do), the General Assembly created a 160mile-long Twelfth District that snakes across piedmont North Carolina. It is difficult to fathom how the State Appellees can defend this suit based on a claim that the General Assembly was merely following the directions of the Attorney General, when the General Assembly did not, in fact, follow those directions. The Attorney General never once suggested that earlier redistricting plans improperly minimized minority voting strength in piedmont North Carolina.

Nor does it matter, for purposes of ruling on a motion to dismiss, that Appellants themselves argue that the General Assembly was pressured into acting as it did by the Attorney General. See State Appellees' Motion to Affirm at 14 n.9. Appellants also argue, alternatively,

that the General Assembly acted with a racially discriminatory purpose of its own. Jur. App. 101a-104a. Pleading in the alternative is an acceptable pleading method, and neither of Appellants' theories of the case is precluded simply because it is inconsistent with another theory raised in the pleadings.

Furthermore, the State Appellees' "the-devil-made-medo-it defense" is inconsistent with the limited role assigned to the Attorney General under § 5 the Voting Rights Act. States and political subdivision that are subject to the requirements of § 5 are under no obligation to seek preclearance from the Attorney General before implementing a voting change. Rather, they may avoid all contact with the Attorney General by filing a declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial approval of the voting change. See Clark v. Roemer, 111 S. Ct. 2096. 2101 (1991).3 Accordingly, the Attorney General simply is in no position to force a state against its will to engage in racial gerrymandering; if a state objects to pressure being placed on it to engage in racial gerrymandering, then it is free to bypass the Attorney General by filing a declaratory judgment action.

Nothing in this Court's UJO decision is to the contrary. In UJO, the Supreme Court rejected a constitutional challenge to a New York State redistricting plan that was consciously designed to create seven state assembly districts with at least 65% nonwhite populations.

A plurality of the Justices were willing to uphold the plan on the grounds that New York did no "more than accede to a position taken by the Attorney General" that creation of seven districts with at least 65% nonwhite populations was required by § 5 of the Voting Rights Act, and that the Attorney General's position was "authorized by our constitutionally permissible construction of § 5." UJO, 430 U.S. at 164 (plurality opinion).

Even if one overlooks the fact that the language cited from UJO did not command the support of a majority of the Justices, that language does not help Appellants because UJO is factually distinguishable from this case.

In UJO, the Attorney General had recommended to New York adoption of the precise plan (seven districts with at least 65% nonwhite populations) that New York eventually adopted. In contrast, in this case the Attorney General did not recommend any specific plan to the North Carolina General Assembly, and even his general suggestion (that the General Assembly consider creation of a second majority-minority district in the south-central to southeast portion of the state) was simply ignored.

More importantly, UJO did not hold that states were entitled to act upon just any recommendation from the Attorney General. Rather, UJO immunized state plans from constitutional challenge only when the plan was explicitly recommended by the Attorney General to ensure compliance with the § 5 "non-retrogression principle" articulated in Beer v. United States, 425 U.S. 130 (1976). UJO, 430 U.S. at 162-163. In UJO, the plaintiffs had

In any subsequent court proceedings, the opinion of the Attorney General regarding whether the voting change at issue complied with § 5 of the Voting Rights Act apparently would be entitled to little or no deference. See 42 U.S.C. § 1973c ("Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin enforcement."); Beer v. United States, 425 U.S. 130 (1976) (over objections of Attorney General, declaratory judgment entered in favor of city to the effect that its redistricting plan complied with § 5; no indication that Attorney General's objections are entitled to deference).

Beer established that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer, 425 U.S. at 141. In other words, the Attorney General is unwarranted in denying preclearance to a § 5 voting change simply because alternative changes might lead to increased voting power for minority groups—so long as the proposed change would not decrease existing levels of minority voting power.

failed to demonstrate that minority voting rights would not regress had New York not adopted the race-conscious redistricting plan recommended by the Attorney General, and thus the plurality upheld race-conscious redistricting under the "non-retrogression principle." *Id.* In contrast, in the instant case, the facts as alleged by Appellants make clear that there was no danger that minority voting strength in North Carolina would regress in the absence of the race-conscious redistricting suggested by the Attorney General. Indeed, the July 9, 1991 plan objected to by the Attorney General called for the creation of one majority-minority congressional district (the First District) where no such district had existed under previous North Carolina districting schemes.

At the very least, Appellants are entitled to discovery on their claim that § 5 of the Voting Rights Act did not authorize creation of any majority-minority districts as a means of preventing retrogression in minority voting strength in the state. Accordingly, the district court erred in granting Appellees' motion to dismiss for failure to state a claim.

# II. SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT MANDATE THE TYPE OF RACIAL GERRYMANDERING ENGAGED IN BY NORTH CAROLINA

The State Appellees did not argue, in their Motion to Affirm, that race-conscious redistricting motivated by a desire to comply with § 2 of the Voting Rights Act, 42 U.S.C. § 1973, is immunized from constitutional challenge. Amici nonetheless address that issue, because

the State Appellees are likely to make that claim in light of the Court's December 7, 1992 formulation of the question presented.

We note initially that there is nothing in the pleadings or the record below to suggest that the General Assembly adopted the Plan based on a good-faith desire to comply with § 2 of the Voting Rights Act. Thus, even if one concedes that action taken based on a good-faith desire to comply with § 2 negates the possibility of an invidious discriminatory motive (and thus immunizes the actor from constitutional challenge), dismissal of Appellants' complaint on that ground was unwarranted in the absence of evidence that the state legislature was so motivated. Dismissal was particularly inappropriate in light of Appellants' explicit allegation that the General Assembly did act with invidious discriminatory intent. Jur. App. 101a-104a.

The scope of § 2 was expanded significantly by the Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 134, which eliminated discriminatory intent as a necessary element of a § 2 violation. The 1982 law replaced the intent requirement with a requirement that courts hearing § 2 cases examine the "totality of the circumstances" to determine whether "the political processes leading to nomination or election . . are not equally open to participation by members of [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Voting Rights Act § 2(b), 42 U.S.C. § 1973(b). The 1982 law made clear, however, "[t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. Id. See Thornburg v. Gingles, 478 U.S. 30, 43 (1986).

Section 2 of the Voting Rights Act provides:

<sup>(</sup>a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen (continued...)

<sup>5 (...</sup>continued) of the United States to vote on account of race or color.

To the extent that the General Assembly adopted the Plan in response to prompting from the U.S. Attorney General, that action should be characterized as an attempt to comply with § 5 of the Voting Rights Act, since the Attorney General's preclearance authority extends only to § 5, not to § 2.

Moreover, this Court has never excused violations of one individual's constitutional rights on the grounds that the state actor was motivated by a desire to protect another individual's rights. See Martin v. Wilks, 109 S. Ct. 2180, 2188 (1989)("A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntarily or otherwise. the conflicting claims of another group of employees who do not join in the agreement.") And state actors may not avoid exacting constitutional scrutiny of their racially motivated conduct "by conceding that they have discriminated in the past, now that it is in their interest to make such a concession," thereby setting up a claim that they are doing nothing more than voluntarily remedying their past transgressions. Wygant v. Jackson Board of Education, 476 U.S. 267, 278-279 n.5 (plurality opinion).

Most importantly of all, § 2 of the Voting Rights Act quite clearly did not require North Carolina to act as it did in establishing two majority-minority congressional districts with "tortured" (Jur. App. 5a), noncompact boundaries. Appellants have alleged (and Appellees do not seriously dispute) that the General Assembly's sole purpose in creating such irregularly shaped districts was to create two districts that almost surely would elect black U.S. Representatives, and thereby provide blacks with representation in the North Carolina congressional delegation roughly proportionate to their numbers within the state. Yet § 2(b) of the Voting Rights Act explicitly states that § 2 does not provide protected classes with a right to proportional representation in elected bodies. This Court's sole decision construing § 2(b), Thornburg v. Gingles, 478 U.S. 30 (1986), emphasized that absence of proportional representation is not evidence that a racial group has suffered "unequal access to the to electoral system" (and thus that a § 2 violation has occurred), and that states are not required to take all conceivable steps to ensure proportional representation of all races. Thornburg. 430 U.S. at 43-46.

In sum, the State Appellees may not immunize their conduct from constitutional challenge by claiming that they were acting in conformity with the Voting Rights Act, because the Voting Rights Act did not require North Carolina to establish anything akin to the two tortured, noncompact majority-minority districts established under the Plan.

#### III. APPELLANTS' RACIAL GERRYMANDERING ALLEGATIONS STATE A CLAIM FOR VIOLATION OF APPELLANTS' CONSTITUTIONAL RIGHTS

The Court's formulation of the "Question Presented" by this case (see page i) requests briefing regarding whether, under the facts of this case, the General Assembly's adoption of the Plan is immunized from constitutional challenge if adoption was motivated by a desire to comply with the Voting Rights Act and the Attorney General's interpretation thereof. Sections I and II of this brief demonstrate that such a motivation does not provide constitutional immunity under the facts of this case. However, this appeal cannot be resolved in its entirety if the Question Presented by the Court is the only issue resolved, because the district court's dismissal does not appear to have rested solely on a finding that the State Appellees' conduct was motivated by a desire to comply with the Voting Rights Act. Rather, the district court held

Amici argue in Section III of this brief that Appellants' allegation that the General Assembly acted with racially discriminatory intent in adopting the Plan' states a cause of action for violation of their rights under the Fourteenth and Fifteenth Amendments. Any interpretation of the Voting Rights Act that suggested that the Act condones such racially discriminatory conduct would raise grave questions as to the constitutionality of the Act. Accordingly, the Court should avoid any such interpretation. It is a cardinal rule of statutory construction that where, as here, a contemplated construction of a statute would raise serious constitutional problems, a court will construe the statute to avoid such problems unless doing so is plainly contrary to the intent of Congress. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988).

that dismissal was proper because Appellants had failed to allege facts necessary to make out a claim for violation of their Fourteenth and Fifteenth Amendment rights. Jur. App. 22a-24a. Amici urge the Court to reach that issue and to hold that Appellants' complaint stated a claim for violation of their constitutional rights.

This Court has long held that the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment protect citizens not only against denial, on the basis of race, of their right to cast election ballots but also against election devices designed to abridge those rights. Thus, in Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court held that allegations of a racially motivated gerrymander of municipal boundaries (plaintiffs alleged that blacks were "fence[d] out" of town in order to deprive them of their pre-existing municipal vote) stated a claim under the Fifteenth Amendment and the Fourteenth Amendment's Equal Protection Clause. Similarly, in Wright v. Rockefeller, 376 U.S. 52 (1964), the Court said that allegations that a state congressional reapportionment plan has been racially gerrymandered states a claim under the Fourteenth and Fifteenth Amendment if it is shown that the state legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; or that the plan "was the product of a state contrivance to segregate on the basis of race or place of origin." Wright, 376 U.S. at 56, 58. See also City of Mobile v. Bolden, 446 U.S. 55, 62-66 (1980) (emphasizing that proof of a "racially discriminatory motivation" is the touchstone of all such Fourteenth and Fifteenth Amendment claims).

While acknowledging that Appellants had alleged that the General Assembly was motivated almost exclusively by racial considerations in adopting the Plan, the district court contended that such an allegation is insufficient to state a constitutional claim. Rather, the district court contended, Appellants were required to allege "a legislative intent to deprive white voters, including plaintiffs, of an equal opportunity with all other racial groups of voters -- on a statewide basis -- to participate in the political process and

to elect candidates of their choice." Jur. App. 23a. The district court also argued that Appellants failed to state a claim due to their failure to allege "the requisite constitutional effect," which the district court said consisted of an allegation that the Plan "has operated to 'fenc[e] out the white population of the [state, or either of the two challenged districts] from participation in the political processes of the [state or districts], [or to] minimize or unfairly cancel out white voting strength." Id. (quoting UJO, 430 U.S. at 165 (plurality opinion).

The language from *UJO* quoted by the district court enjoyed the support of only three members of the Court. *Amici* respectfully suggest that the quoted language (from Part IV of the plurality opinion in *UJO*) is inconsistent with other decisions of this Court and is not now good constitutional law, if it ever was. Part IV is inconsistent with the Court's prior holdings in *Gomillion* and *Wright* and with subsequent decisions that make clear that the Fourteenth and Fifteenth Amendments protect *individual* rights, not group entitlements.

#### A. Constitutional Rights Merit Protection on an Individual Basis, Rather Than on the Basis of Racial Groupings

The district court erred in judging Appellants' claims based on whether the Plan disadvantaged racial groupings to which Appellants belong. It may be true that ten of the 12 U.S. Representatives elected from North Carolina in 1992 are white, but that circumstance does not overcome the fact that the white Appellants living in the Twelfth District have effectively been disenfranchised by the conscious design of the General Assembly. Those Appellants now live in a congressional district which the General Assembly has determined should be represented by an African American. They have effectively been cut out of the electoral process, because the Twelfth District has been designed to ensure that successful candidates have only a limited need to appeal to the white community. Indeed, their district so grossly violates normal

compactness considerations that their ability to communicate with others in the district in order to encourage group political activity has been significantly impaired.

As the dissenting judge on the district court pointed out, arguments that white voters in the First and Twelfth Districts are adequately represented by white Congressmen from other districts fly in the face of common understanding. Most voters desire representation by elected officials who live in their communities and share common economic conditions, not by officials from distant parts of the state. Jur. App. 46a-47a (Voorhees, J., dissenting). It is far more likely that "two voters of different races in a given geographically compact district will share the same interests and concerns and elect a mutually agreeable Representative, irrespective of race."

The Court in other contexts has repeatedly emphasized that civil rights are to be judged on an individual basis, not on the basis of racial groupings. Thus, for example, in Connecticut v. Teal, 457 U.S. 441 (1982), the Court rejected a "bottom line" defense in disparate impact employment discrimination claims brought Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e et seq. The employer had argued that it could not be held liable under Title VII for maintaining a particular employment practice that had a disparate impact upon blacks, provided that the "bottom line" was that its employment practice, taken as a whole, had no racially disparate impact. The Court

rejected that argument, stating, "The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole." Teal, 457 U.S. at 453-454. The Court held that an individual victim of racial discrimination should not be denied Title VII relief merely because, on a group-wide basis, members of his racial group have not been disadvantaged. Id. at 454-455.

Nor have defendants in "reverse discrimination" lawsuits (suits in which whites allege that they are the victims of racial discrimination) ever been permitted to defend on the ground that the plaintiffs are members of a racial group that, on the whole, has gotten more than a proportionate share of society's bounty. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Board of Education, 467 U.S. 267 (1986); Regents of University of California v. Bakke, 438 U.S. 265 (1978). Rather, in each case the Court has examined the plaintiffs' claims of racial discrimination on an individualized basis.

In sum, the district court erred in dismissing Appellants' claims of racial discrimination on the basis that the racial group to which they belong has not suffered any "bottom line" injury. Rather, the district court should have permitted Appellants to attempt to prove that their individual rights under the Fourteenth and Fifteenth Amendments were violated by the General Assembly's adoption of the plan.

#### B. The General Assembly Violated Appellants' Right to Have Congressional Districts Lines Drawn on a Race-Blind Basis

Appellants do not complain merely that their voting rights have been abridged as a result of the racial gerrymandering alleged to have occurred in this case. They also complain that the Plan violates their (and every citizen's) Equal Protection rights to live in a society in which the government does not segregate voters on the

The district court's argument that Appellants have not adequately alleged that the General Assembly intentionally discriminated against them as white citizens (Jur. App. 23a) is frivolous. By racially gerrymandering the North Carollina congressional districts to ensure an increase from zero to (at least) two in the number of black Representatives, the General Assembly was, by definition, decreasing the number of white Representatives state-wide to (at most) ten and the number of white Representatives representing citizens of the First and Twelfth Districts from one to zero.

basis of race. See Appellants' Jurisdictional Statement at 35-36. That claim is cognizable under the Fourteenth Amendment, and the district court erred in dismissing it.

UJO is the only decision of this Court that has upheld conscious use of racial criteria in redistricting cases in the face of constitutional challenge, and the decision in UJO was quite limited: race may be taken into account for the purpose of ensuring (pursuant to § 5 of the Voting Rights Act) that voting-method changes enacted by jurisdictions with a-history of discrimination against racial minority groups do not result in decreasing the ability of those minority groups to participate meaningfully in the electoral process. UJO, 430 U.S. at 162-165 (plurality opinion). The Court's other cases that have considered the constitutional ramifications of the issue (including Gomillion and Wright) have condemned drawing electoral districts along racial lines in no uncertain terms.

As Justice Douglas pointed out in Wright, racial gerrymandering is an evil without regard to its effects on the voting power of any individuals:

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

"Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

Wright v. Rockefeller, 376 U.S. at 67 (Douglas, J., dissenting).9

In a variety of contexts, the Court has indicated that individuals' civil rights extend to the right to an environment free from state-mandated racial discrimination, without regard to whether the individual has suffered any other injury. Thus, criminal defendants (Powers v. Ohio, 111 S. Ct. 1364 (1991)), civil litigants (Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), and even criminal prosecutors (Georgia v. McCollum, 112 S. Ct. 2348 (1992)) are entitled under the Constitution to insist that courtroom adversaries not exercise peremptory challenges to strike jurors on the basis of their race, because allowing any state-sanctioned racial discrimination to infect the trial system calls into question the essential fairness of that system. Similarly, the Court has allowed housing discrimination "testers" who were never actually denied housing on the basis of race (because they never intended to rent the apartment they applied for) to sue for violations of the Fair Housing Act of 1968, 42 U.S.C. § 3604, because any housing discrimination on the basis of race "deprived them of the benefits that result from living in an integrated community." Havens Realty Corp. v. Coleman, 455 U.S. 363, 375 (1982). See, also, Loving v. Virginia, 388 U.S. 1 (1967) (Constitution prohibits state laws outlawing inter-racial marriage, despite fact that such laws have an equal impact on all races).

The State Appellees contend that demanding that racial considerations play no part in redistricting efforts is unrealistic, because "[e]ven if redistricting lines were originally fashioned with no race-consciousness whatsoever, 'it is most unlikely that the . . . impact of

Justice Douglas dissented in Wright from the majority's holding that the plaintiffs had failed to prove that the state legislature had purposely drawn congressional districts along racial lines. The majority opinion strongly indicates that the majority did not disagree with the thoughts expressed by Justice Douglas regarding the evils of racial gerrymandering. Wright, 376 U.S. at 56, 58.

such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.'" State Appellees' Motion to Affirm at 16 (quoting Gaffney v. Cummings, 412 U.S. 735, 753 (1973)). That argument ignores the common-sense distinction that the Court has regularly drawn between conduct with a discriminatory purpose and conduct taken "in spite of" its consequences:

"'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effect upon an identifiable group."

City of Mobile, 446 U.S. at 71 n.17 (quoting Personnel Manager of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)). In other words, states need not worry that their redistricting plans will be struck down as constituting an illegal racial gerrymander merely because drafters were aware of the effect that the plan would have on various racial groups.

Nor need we simply throw our hands in the air and concede that there is no such thing as a race-neutral This Court has long recognized redistricting plan. compactness of districting as an objective to be aspired to. See, e.g., UJO, 430 U.S. at 168 (plurality "compactness" and "population opinion)(describing equality" as "sound districting principles"); Karcher v. Daggett, 462 U.S. 725, 755-756 (1983). Legal scholars have devised a variety of methods for measuring objectively the extent to which the compactness of electoral districts in a given redistricting plan varies from optimal compactness. See, e.g., D. Polsby and R. Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale Law & Policy Review 301 (1991). Redistricting plans that closely approximate an objectively determinable optimal

compactness would be largely immune to claims that they were the result of unconstitutional racial gerrymandering. Of course, the close cases would be those (such as Wright v. Rockefeller) in which there is no "smoking gun" in the form of admissions that race played a role in redistricting. When, as here, no one seriously contests that race was the key determinant in drawing up the Plan, there should be little hesitation in finding a constitutional violation.

In sum, Appellants' allegation that the General Assembly denied them the right to live in a society free from state-sponsored racial discrimination states a cause of action under the Fourteenth Amendment's Equal Protection Clause. The district court erred in dismissing that claim.

#### CONCLUSION

Amici respectfully request that the judgment of the United States District Court for the Eastern District of North Carolina be reversed.

Respectfully submitted,

DANIEL J. POPEO RICHARD A. SAMP (Counsel of Record) WASHINGTON LEGAL FOUNDATION 1705 N Street, NW Washington, DC 20036 (202) 857-0240

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Appellants.

V

WILLIAM BARR, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF APPELLEES

NICHOLAS DEB. KATZENBACH\*
MICHAEL R. COLE
ALAN E. KRAUS
DEBORAH J. FENNELLY
BARBARA LACZYNSKI
JEFFREY M. SIMINOFF

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI Headquarters Plaza One Speedwell Avenue Morristown, New Jersey 07962-1981 (201) 538-0800 HERBERT WACHTELL, Co-Chair WILLIAM H. BROWN, III, Co-Chair BARBARA R. ARNWINE THOMAS J. HENDERSON FRANK R. PARKER BRENDA WRIGHT JAMES J. HALPERT

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW 1400 Eye Street, N.W. Washington, D.C. 20005

Counsel for Amici Curiae

February 22, 1993

\*Counsel of Record

(Additional Counsel Listed on Inside Cover)

RUTH O. SHAW, et al.,

Appellants,

V

WILLIAM BARR, et al.,

Appellees.

LAUGHLIN McDonald KATHY WILDE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC. 44 Forsyth Street, N.W., #202 Atlanta, Georgia 30303

E. RICHARD LARSON
THERESA BUSTILLOS
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND
634 South Spring Street, 11th Floor
Los Angeles, California 90014

Dennis Courtland Hayes, General Counsel National Association for the Advancement of Colored People 4805 Ben L Hooks Drive Baltimore, Maryland 21215

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V

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# INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law, the American Civil Liberties Union, the Mexican American Legal Defense and Educational Fund and the National Association for the Advancement of Colored People submit this brief as amici curiae with the consent of the parties in support of appellees' position that North Carolina's adoption of a congressional redistricting plan different from that allegedly suggested by the United States Attorney General does not subject North Carolina's plan to judicial invalidation on the grounds that it constitutes invidious race conscious redistricting. Protection of the voting rights of minorities is an important aspect of the work of each of the amici, as demonstrated by their frequent appearances before this Court in various voting rights cases since the adoption of the Voting Rights Act in 1965.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Lawyers' Committee has frequently represented black citizens in voting rights cases before this Court, including Smith v. Clinton, 488 U.S. 988 (1988), and Connor v. Finch, 431 U.S. 407 (1977), and has appeared in other significant voting rights cases in this Court. See Clark v. Roemer, 500 U.S. \_\_\_, 111 S. Ct. 2096 (1991).

The American Civil Liberties Union ("ACLU") is a nation-wide organization with over 250,000 members. Since 1965, the ACLU has maintained a Southern Regional Office whose primary emphasis has been challenging barriers to political participation by minorities, including at-large elections, discriminatory reapportionment, and failure to comply with preclearance under § 5 of the Voting Rights Act. It has participated in scores of voting rights cases, including Rogers v. Lodge, 458 U.S. 613 (1982); McCain v. Lybrand, 465 U.S. 236 (1984); Hunter v. Underwood, 471 U.S. 222 (1985); and Georgia Board of Elections v. Brooks, \_\_\_ U.S. \_\_\_, 111 S. Ct. 288 (1990). The ACLU was actively involved in the preclearance process which resulted in the creation of the majority black Congressional district in North Carolina at issue in this case.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a non-profit national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Because of the importance of the fundamental right to vote, MALDEF has represented Hispanic voters in numerous voting rights cases, has frequently appeared before this Court in such cases, see, e.g., City of Lockhart v. United States, 460 U.S. 125 (1983), has challenged the redistricting of the most populous local jurisdiction in the country, see Garza v. County of Los Angeles, 756 I. Supp. 1298 (C.D. Cal.), aff'd, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. \_\_\_, 111 S. Ct. 681 (1991), and has been intensely involved in redistricting advocacy following the 1990 census, see, e.g., Hastert v. State Board of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court); Wilson v. Eu, 823 P.2d 545 (Cal. 1992).

The National Association for the Advancement of Colored People ("NAACP") is a non-profit organization with substantial numbers of members nationwide. The NAACP has chartered affiliates in the State of North Carolina. Since its founding in 1909, one of the principal goals of the NAACP has been to insure that minority group citizens have an equal and full opportunity to participate in the political process and to elect representatives of their choice. The NAACP fought for passage of the Voting Rights Act of 1965 and thereafter has sought to ensure the voting rights of minorities through legislative advocacy and litigation.

# **QUESTION PRESENTED**

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own. Shaw v. Barr, \_\_\_ U.S. \_\_\_, 113 S. Ct. 653-54 (1992).

# SUMMARY OF ARGUMENT

The decision by North Carolina to create a second legislative district with a majority black population in order to comply with the Voting Rights Act of 1965 is not subject to constitutional challenge, whether or not the North Carolina legislature acceded to the plan suggested by the United States Attorney General. Compliance with the Attorney General's suggestions is not the test for whether race-conscious redistricting is constitutional. This Court has repeatedly upheld, both explicitly and implicitly, the constitutionality of race conscious redistricting or reapportioning in order to comply with the Voting Rights Act. The Constitution does not require, as appellants contend, color blind redistricting. Thus, as long as a state legislature is attempting to comply with the Voting Rights Act's prohibition against, inter alia, diluting the voting rights of minorities, and the legislature does not unfairly dilute the voting rights of the white majority, the legislature's action is per se constitutional.

This is so because race conscious redistricting in order to comply with the Voting Rights Act does not discriminate against white voters. Race conscious redistricting does not deprive white voters of any rights or entitlements: white voters have no constitutionally protectible right to vote in a white majority district or to elect a white representative or to insist that legislative districts be compact or contiguous. As this Court held in *United Jewish Organizations of Williams-burgh, Inc. v. Carey*, 430 U.S. 144, 166 (1977) (plurality opinion) ("*UJO*"), so long as whites "as a group, [are] provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgement of their right to vote on the grounds of race."

The fact that North Carolina or any other state legislature does not adopt a particular redistricting plan suggested by the Attorney General is irrelevant to the constitutionality analysis. First, the Attorney General's role under the Voting Rights Act is merely to preclear changes in voting procedures by states subject to Section 5 of the Voting Rights Act. Nothing in the Voting Rights Act or this Court's UJO decision gives the Attorney General the power to immunize a redistricting decision from constitutional challenge. Said another way, race conscious redistricting is constitutional because it does not discriminate against white voters, not because of any imprimatur by the Attorney General. It does not become constitutionally suspect simply because the state does not choose to have the Attorney General prescribe the details of the districting plans.

Second, it would be fundamentally inconsistent with the Voting Rights Act to give the Attorney General such a critical role. If a state legislature subject to Section 5 of the Act voluntarily draws a redistricting plan that complies with the Act on its first try, there will be no occasion for the Attorney General to offer an alternative plan. And, if a state is not subject to Section 5, there is no opportunity even for the Attorney General to review its redistricting plan. There is, in short, no principled constitutional or statutory basis to say that a voluntarily drawn plan is subject to constitutional challenge, while a

plan drawn to comply with a suggestion by the Attorney General is not.

And finally, to require that the Attorney General "suggest" any race conscious redistricting plan before it could be considered safe from constitutional challenge would both conflict with this Court's well-recognized deference to legislative judgments in redistricting and present an administrative nightmare for a Department of Justice that is already overburdened by its preclearance responsibilities.

In sum, North Carolina's redistricting plan is constitutional because it does not discriminate against white voters. The fact that North Carolina did not adopt the Attorney General's suggested plan does not affect that analysis at all. The District Court's decision dismissing Appellants' challenge to North Carolina's redistricting plan should be affirmed.

## ARGUMENT

I. APPELLANTS HAVE NO CLAIM THAT NORTH CAROLINA'S REDISTRICTING PLAN IS DISCRIMINATORY OR VIOLATES THE CONSTITUTION BECAUSE THEY HAVE SUFFERED NO COGNIZABLE INJURY.

Appellants' constitutional challenge to North Carolina's redistricting plan (the "Plan") fails for the most basic of reasons: they have not suffered any cognizable, constitutional injury as a consequence of the Plan nor can they prove that the North Carolina legislature acted with invidious intent in enacting the Plan.

At bottom, appellants' allegation is that every race conscious redistricting plan perforce violates the Constitution. Appellants are wrong. So long as a race conscious redistricting plan does not unfairly minimize the voting strength of white voters as a group, race conscious redistricting to comply with the Voting Rights Act is constitutional. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (plurality opinion) ("*UJO*"). There is no allegation here that the voting rights of whites have been impermissibly

diluted. Accordingly, appellants' constitutional challenge to the Plan must fail.

# A. The Constitution Does Not Require Color-Blind Redistricting.

There is simply no constitutional mandate, as appellants apparently claim, that the redistricting process be color blind. As this Court long ago recognized in South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Voting Rights Act of 1965, 42 U.S.C. §§ 1973a to 1973ff-6, was passed to prohibit and remedy a historical pattern of discrimination against minorities in voting.

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country.

383 U.S. at 308.

This Court has repeatedly held, both explicitly and implicitly, that the Voting Rights Act is constitutional and that race conscious redistricting or reapportionment in order to comply with the Voting Rights Act is permissible under the Constitution. See UJO, 430 U.S. 144; Beer v. United States, 425 U.S. 130 (1976); City of Richmond v. United States, 422 U.S. 358 (1975); Allen v. State Board of Elections, 393 U.S. 544 (1969); South Carolina v. Katzenbach, 383 U.S. 301. As this Court recognized in UJO, implicit in this Court's many precedents interpreting the Voting Rights Act is "the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. . . . [N]either the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment." 430 U.S. at 161.

Indeed, only three years ago, this Court expressly reaffirmed that holding in *Metro Broadcasting*, *Inc. v. FCC*, 497 U.S. 547 (1990):

[M]any of our voting rights cases operate on the assumption that minorities have particular viewpoints and interests worthy of protection. We have held, for example, that in safeguarding the "effective exercise of the electoral franchise" by racial minorities, United Jewish Organizations v. Carey, 430 U.S. 144, 159, 97 S.Ct. 996, 1007, 51 L.Ed.2d 229 (1977) (plurality opinion), quoting Beer v. United States, 425 U.S. 130, 141, 96 S.Ct. 1357. 1363, 47 L.Ed.2d 629 (1976), "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." 430 U.S., at 161, 97 S.Ct., at 1007-1008. Rather, a State subject to § 5 of the Voting Rights Act of 1965, 79 Stat. 439. as amended 42 U.S.C. § 1973c, may "deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5"; "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment." 430 U.S., at 161, 97 S.Ct., at 1007.

Metro Broadcasting, 497 U.S. at 583-84.

In fact, the remedial purposes of the Voting Rights Act could not be accomplished if, as appellants contend, the states were required to engage in color-blind redistricting. Section 2 of the Act mandates a "results" or "effects" test; any redistricting plan that results in the dilution of minority voting rights, as defined in the Act, violates § 2, whether or not that dilution is intentional. Thus, a state like North Carolina with a significant minority population can not ensure that it complies with the Voting Rights Act without examining several factors. Those include the geographic concentration of minority voters and the possibility and desirability of creating one or more districts with a majority of minority voters. Indeed, if states ignored those factors and engaged in color blind redistricting their chances of violating § 2 of the Voting Rights Act would be quite high. Certainly, it makes no sense

to argue that states must comply with § 2 of the Act but they are forbidden to do so on purpose.

Moreover, to require color-blind redistricting would be to ignore and subvert the political realities of the Voting Rights Act and the redistricting process. That process necessarily considers and turns upon political consequences. As this Court has pointed out in the one-person, one-vote context, "[d]istrict lines are rarely neutral phenomena. . . . The reality is that districting has and is intended to have substantial political consequences." Gaffney v. Cummings, 412 U.S. 735, 753 (1973). If, as this Court noted in Metro Broadcasting, "minorities have particular viewpoints and interests worthy of protection," 497 U.S. at 583, then a rule requiring colorblind redistricting would impose upon minorities a special disadvantage not visited upon any other interest group. That result would be flatly contrary to the plain intent of the Voting Rights Act. Maintaining cohesive communities of interest is a legitimate state interest in redistricting - and it applies whether the community is majority white or majority black. See Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

Further, a constitutional rule requiring color-blind redistricting would inevitably result in a double standard, heavily weighted against black voters. Legislators invariably know the racial composition of districts they are creating. Subjecting minority dominant districts to strict scrutiny analysis, thus requiring the state to demonstrate a compelling state interest in designing that particular district, while not requiring a similar demonstration for white districts creates a cruel and indefensible distinction.<sup>1</sup>

In sum, this Court has repeatedly upheld the constitutionality of race conscious redistricting in order to comply with

the Voting Rights Act. Appellants' bald attempt to overrule those well-settled precedents should be summarily rejected.<sup>2</sup>

B. White Voters Suffer No Cognizable Fourteenth Or Fifteenth Amendment Injury If The Plan Does Not Dilute The Voting Strength Of Whites As A Group And Is Not Motivated By An Invidious Intent Toward Them.

Moreover, appellants have not suffered any constitutional injury as a consequence of North Carolina's Plan. For that reason alone, appellants' constitutional claims should be rejected.

In order to make out a claim of invidious discrimination in voting in violation of the Equal Protection Clause of the Fourteenth Amendment, this Court has consistently held that challengers must demonstrate that the scheme operates to minimize or cancel out the voting strength of the racial group as a whole. See, e.g., White v. Regester, 412 U.S. 755 (1973) (in state legislative reapportionment scheme, relatively minor population deviations among districts did not substantially dilute the weight of individual votes so as to deprive voters of fair and effective representation); Whitcomb v. Chavis, 403 U.S. 124 (1971) (holding that the plaintiffs' burden is to establish that the political process is not equally open to participation by the group in question and that its members had less opportunity than did residents in the district to participate in the political processes and to elect legislators of their choice). Indeed, in the context of the Voting Rights Act, this Court has expressly held that as long as whites "as a group, [are] provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race." UJO, 430 U.S. at 166.

<sup>1.</sup> Thus, proscribing consideration of the plan's impact on a racial group would itself be a race-conscious rule, one that disadvantages precisely those whom the Voting Rights Act was designed to protect. See David Strauss, The Myth of Colorblindness, 1986 Sup Ct. Rev. 99, 114 (1986).

<sup>2. &</sup>quot;Time and again this Court has recognized that the doctrine of stare decisis is of fundamental importance to the rule of law... Adherence to precedent promotes stability, predictability and respect for judicial authority... For all of these reasons we will not depart from the doctrine of stare decisis without some compelling justification." Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. \_\_\_, \_\_, 112 S. Ct. 560, 563-64 (1991) (citations omitted).

In short, under the Fourteenth Amendment, appellants have no claim unless they can show that, as a group, the voting rights of whites have been diluted or otherwise impaired. The record is bereft of any such evidence or even allegation. Appellants have not even attempted such a showing here.

Under the Fifteenth Amendment, a claimant must allege that his or her ability and freedom to vote has been intentionally denied or abridged on account of his or her race. City of Mobile v. Bolden, 446 U.S. 55, 63 (1980). Here, appellants have not alleged that their freedom to vote has been denied, intentionally or unintentionally. Rather, appellants contend only that their individual rights were violated when they were placed in a district where the majority of voters are minority group members or when North Carolina drew district lines that were not sufficiently compact or contiguous, whatever those standards might mean. But appellants have no such rights under the Fourteenth or Fifteenth Amendments.

As this Court held in *UJO*, a state is free to consider race in drawing district lines so long as it does not violate the Fourteenth and Fifteenth Amendment rights of white voters. 430 U.S. at 159-68. If white voters as a group are fairly represented statewide, their constitutional rights are not violated. *Id.* at 166.

Thus, white voters are not constitutionally entitled to elect a white representative to Congress or to live in a district where the majority of voters are white. No racial group, minority or majority, has a right to elect representatives in proportion to their percentage of the overall population. See, e.g., Whitcomb v. Chavis, 403 U.S. at 149 (the fact that the number of legislators who were ghetto residents was not in proportion to the percentage of the population who were ghetto residents does not prove invidious discrimination absent evidence that ghetto residents had less opportunity than other voters to participate in the political process and to elect legislators of their choice). Indeed, the 1982 amendments to § 2(b) of the Voting Rights Act incorporate this principle, stating that "nothing in [§ 2] establishes a right to have

members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973a.

This Court has consistently held that an individual voter "has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote." *UJO*, 430 U.S. at 166. Thus, "[t]he mere fact that one interest group or another ... has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political systems." Whitcomb, 403 U.S. at 154.

In sum, North Carolina did not prevent white voters such as appellants from participating in the political process nor did it otherwise impair any of their constitutional rights when it created a second district with a majority of minority voters. Accordingly, in the words of *UJO*, North Carolina "was free to do what it did," whether or not it complied with any suggestions by the Attorney General. 430 U.S. at 165 (plurality opinion).

# C. Color Conscious Redistricting Is Especially Appropriate in North Carolina.

The Voting Rights Act, and particularly § 5, is a remedial statute, intended to ensure that minorities do not suffer discrimination in voting in states which historically used discriminatory practices to disenfranchise minorities. "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution . . . [and] concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment." South Carolina v. Katzenbach, 383 U.S. at 309. In short, the Voting Rights Act represents a conscious decision on the part of the Congress "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." Id. at 328; see also H.R. REP. No. 439, 89th Cong. 1st Sess. (1965), reprinted in 1965

U.S.C.C.A.N. 2540 ("House Report") (Joint Views of 12 members of the Judiciary Committee related to the Voting Rights Act of 1965).

It is particularly appropriate for North Carolina to take race into account in its efforts to comply with the Voting Rights Act. The past history of that state in burdening and disenfranchising minority voters compelled that corrective action. North Carolina was one of nine states using literacy tests and other devices to exclude black voters when the Voting Rights Act was passed in 1965. House Report, 1965 U.S.C.C.A.N. at 2444. Similarly, North Carolina at that time had well-documented policies of racial discrimination in other areas such as travel, recreation, education and hospital facilities. Id. Thirty-four of North Carolina's counties were designated in 1965 as "covered" counties under § 4(b) of the Act, thus requiring preclearance by the Attorney General of any changes in voting procedures. Id. at 2445.

North Carolina continued to lag behind in recognizing and enforcing minority voting rights even after the passage of the Voting Rights Act. By the time the Voting Rights Act was extended in 1970, the number of "covered" counties in North Carolina had actually risen from 34 to 39. H.R. REP. No. 397, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 3279; House Report, 1965 U.S.C.C.A.N. at 2445.

In 1975, when certain sections of the Voting Rights Act were being reconsidered by Congress, the most recent available data concerning black registrations showed a disparity of 17.8 percent between black and white voter registration in North Carolina. S. REP. NO. 295, 94th Cong., 1st Sess. (1975), reprinted in 1975 U.S.C.C.A.N. 774, 779. "[I]n six of the covered counties in North Carolina, white registration [exceeded] that of blacks by more than 25 percentage points." Id. at 780.

North Carolina's lack of commitment to minority voting rights, particularly as reflected in its 1981 congressional redistricting plan, was criticized again when the Voting Rights Act was extended in 1982. See S. REP. No. 417, 97 Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C:A.N. 177,

188. And, in Thornburg v. Gingles, 478 U.S. 30 (1986), this Court affirmed a finding that certain at-large districts drawn by North Carolina after the 1980 census diluted minority voting rights in violation of § 2 of the Voting Rights Act. In Thornburg, this Court further found that voting in North Carolina was racially polarized; that there were severe socioeconomic disparities between whites and blacks; that black voter registration rates were disproportionately low; that statewide electoral campaign had been marked by racial appeals to white voters; and that candidates preferred by black voters were routinely defeated by white bloc voting. See 478 U.S. at 80.

Indeed, until 1992, no black had been elected to represent North Carolina since 1901. James Bennet, *The 1992 Elections: State by State*, N.Y. TIMES, Nov. 5, 1992, at B12. And even the current Plan overrepresents whites as a percentage of the overall population: blacks constitute 22% of North Carolina's population, yet only two of twelve districts, or 17 percent, are majority-minority districts. *See* App. Br. at 57.

In light of that history, North Carolina's 1992 use of race conscious redistricting in order to comply with the Voting Rights act is a necessary, appropriate and minimally required response to past wrongs. Appellants' criticisms of that effort ring especially hollow.<sup>3</sup>

Both before and after *UJO*, the federal courts have routinely recognized the necessity for race conscious redistricting in order to comply with the Voting Rights Act. See, e.g., Jeffers v. Clinton, 730 F. Supp. 196, 217 (E.D. Ark. 1989) (where racially polarized voting existed and where the number of majority-minority districts was known, there was a "presumption that any plan adopted should contain that number of majority-black districts"), aff'd mem.,

<sup>3.</sup> Given this history, we submit that even if this Court were to find that race conscious redistricting is generally not allowable (which we submit it should not), it certainly should be allowed to redress past wrongs when the Attorney General objects to a plan on the ground that additional majority-minority districts are required in order to comply with the Voting Rights Act.

U.S. \_\_\_,111 S. Ct. 662 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1413 (7th Cir. 1984) (rejecting district court's plan because it did not take into account that "minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice"), cert. denied, 471 U.S. 1135 (1984); Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139, 148-52 (5th Cir.) (rejecting supervisors' reapportionment plan because, despite the existence of bare minority population majorities in two districts and the fact that an ameliorative plan might require a racial gerrymander, the plan did not afford blacks a reasonable opportunity to elect officials of their choice), cert. denied, 434 U.S. 968 (1977); Jordan v. Winter, 604 F. Supp. 807, 814 (N.D. Miss.) (courtordered plan created a congressional district "with a clear black voting age population majority" that was "sufficient to overcome the effects of past discrimination and racial block voting"), aff'd mem. sub nom. Mississippi Republican Executive Comm'n v. Brooks, 469 U.S. 1002 (1984).4 There is no constitutional justification for a rule that courts can order race conscious redistricting in order to comply with the Voting Rights Act, but that the states cannot avoid a violation of the Act by voluntary action to protect minority voting strength.

# D. Non-Compactness Or Non-Contiguity Is Not A Basis To Invalidate The Plan.

Appellants and their supporting amici characterize the second majority-minority district drawn by North Carolina as "bizarre" "political pornography" and suggest that its lack of

compactness somehow makes it constitutionally suspect. See App. Br. at 61. But it has never been the law that the Fourteenth or Fifteenth Amendment — or any other constitutional provision — requires compactness or contiguity.

Thus, although compactness and contiguity are legitimate policies which states may consider when formulating plans for redistricting, Karcher v. Daggett, 462 U.S. 725, 740-41 (1983); Reynolds v. Sims, 377 U.S. 533, 578 (1964), the lack of those qualities in a districting plan, or in one district within a plan, is not a constitutional violation. As this Court has recognized, "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement" for redistricting schemes. Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973) (concluding that minor population variations among districts did not violate the Fourteenth Amendment, despite the challengers' characterization of the districts' shapes as "indecent"); see also Cline v. Robb, 548 F. Supp. 128, 133 (E.D. Va. 1982) (reapportionment plan which attained population equality among single-member districts did not violate equal protection, noting that compactness and contiguity are not requirements of equal protection); Cook v. Luckett, 735 F.2d 912, 920 (5th Cir. 1984) (district court erred in rejecting reapportionment plan on the grounds that its districts were "bizarrely shaped"). Thus, even the most tortured district is not suspect merely by reason of its shape.<sup>5</sup>

Indeed, North Carolina's recent redistricting plan was challenged in part on compactness and contiguity grounds in a parallel political gerrymander lawsuit. That action was dismissed by the district court and that dismissal was affirmed by this Court. *Pope v. Blue*, No. 3:92CV71-P, 1992 WL 378742

<sup>4.</sup> This Court's decision in *Metro Broadcasting*, further supports the notion that North Carolina's race conscious redistricting is constitutional. There, the Court held that minority preference policies of the Federal Communications Commission do not violate the Equal Protection Clause incorporated in the Fifth Amendment. The Court found that such policies, as approved by Congress, were substantially related to the important governmental interest of achieving diverse programming. 497 U.S. at 569-71. Surely, North Carolina's goal of compliance with the Voting Rights Act is at least as substantially related to the important governmental interest of avoiding the dilution or impairment of minority voting rights — and hence equally constitutional.

<sup>5.</sup> Early in this century, federal law required compactness of districts. That law expired, however, and subsequent laws omitted any such requirement. Wood v. Broom, 287 U.S. 1, 6 (1932). As the Court held in Wood, "[i]t was manifestly the intention of the Congress not to reenact the provision as to compactness. . . " Id. at 7. Consequently, to impose a judicially created requirement of compactness for congressional districts, where the constitutional imperative for compactness was deliberately not reenacted, would arguably fly in the face of Congress' expressed intent not to mandate such standards.

(W.D.N.C. Apr. 16, 1992), aff'd mem., \_\_\_ U.S. \_\_\_, 113 S. Ct. 30 (1992).

Nor does lack of compactness or contiguity add anything to appellants' equal protection or Fifteenth Amendment arguments. To the contrary, the federal courts have often rejected such arguments even where the state in question had its own law requiring compactness or contiguity. See, e.g., Fletcher v. Golder, 959 F.2d 106, 109-10 (8th Cir. 1992) (county voting district reapportionment plan did not fail to satisfy Missouri compactness requirement merely because it resulted in districts which had "branches," where branches were necessary to achieve minority representation); Jordan, 604 F. Supp. 807 (court-ordered interim redistricting plan created a noncompact minority district in part because it yielded the least adverse impact on the black voting influence in another district).

Furthermore, a requirement of compactness provides no assurance of fairness. "[T]he use of highly compact districts may be the most effective way to shut out a minority from equal participation. A strict compactness requirement would leave groups that could benefit from slightly stretching out districting lines remediless." Joseph Markowitz, Constitutional Challenges to Gerrymanders, 45 U. Chi. L. Rev 845, 879 (1978).

Moreover, a per se requirement of compactness would be unmanageable. There is no agreed-upon definition of, nor method for measuring, compactness. See Karcher, 462 U.S. at 756 n.19 (Stevens, J., concurring); see also Bernard Grofman, Criteria For Districting: A Social Science Perspective, 22 U.C.L.A. L. Rev. 77, 84 (1985) ("[t]here are many different ways of applying a compactness requirement but none is generally accepted as definitive"). In fact, state requirements for compactness and contiguity "have been of limited utility because they have not been defined and applied with rigor and precision." Karcher, 462 U.S. at 756 (Stevens, J. concurring).

Indeed, the alternative plans for a second black majority district in North Carolina implicit in the Assistant Attorney General's objection notice<sup>6</sup> were themselves suspect on that score because the resulting districts would have had "irregular" shapes.<sup>7</sup> Moreover, if compactness is a federal requirement, it cannot be a requirement limited only to black majority districts. States create noncompact districts for many reasons: to recognize communities of interest, to protect incumbents, and to achieve partisan advantage.<sup>8</sup> Creating a federal right to compact districts therefore would subject virtually every plan to a challenge on the grounds that more compact districts could have been created — a threshold easily met. The Court should not fall into that trap.

# E. Appellants' Reliance On This Court's Recent Equal Protection Decisions Is Misplaced.

Finally, appellants' reliance on recent equal protection decisions by this Court misses the mark. In each of those cases, the plaintiffs had rights or entitlements that were taken away or impaired as a result of challenged race conscious state action. Here, however, none of appellants' voting rights as white voters were infringed or eradicated by North

<sup>6.</sup> Assistant Attorney General Dunne's letter is reprinted in the appendix to the Jurisdictional Statement filed by appellants in *Pope v. Blue* ("J.S. App."). Appellants have filed copies of that statement with the Clerk of this Court. See App. Br. at 7 n.2.

<sup>7.</sup> The Attorney General's letter disapproved North Carolina's first Congressional redistricting plan on the grounds that minority voting rights would be diluted in the south-central to southeastern part of the State, "even though its seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state." Letter from John R. Dunne, Assistant Attorney General, to Tiare B. Smiley, Esq., Special Deputy Attorney General (Dec. 18, 1991) (hereafter "Dunne Letter"); J.S. App. at 59a.

<sup>8.</sup> Significantly, in this case, as the Republican National Committee has argued in its amicus brief, the noncompact shape of North Carolina's second majority-minority district resulted, not from any racially discriminatory motive, but rather from the usual partisan political goal of preserving incumbents. See Brief of Amicus Curiae Republican National committee at 5.

Carolina's recent redistricting (see supra at 12-15). For that reason alone, this Court's recent equal protection decisions are inapposite.

For example, in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), a minority set-aside for city construction subcontracts denied non-minority citizens "the opportunity to compete for a fixed percentage of public contracts based solely upon their race." If qualified, those non-minority citizens were entitled to compete for those public contracts. Id. at 493 (plurality opinion). Similarly, in Batson v. Kentucky, 476 U.S. 79 (1976), Powers v. Ohio, 499 U.S. \_\_\_, 111 S. Ct. 1364 (1991), and Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 111 S. Ct. 2077 (1991), this Court held that civil and criminal litigants, regardless of their race, had a right to a jury that was not tainted by racial discrimination in its selection process. The Court further held that all persons, regardless of their race, have a right to serve on juries, and that exclusion of jurors on the basis of their race undermines public confidence in the jury system. See Batson, 476 U.S. at 85.

Here, in contrast, appellants' right to vote has not been impaired by the Plan. Appellants have not lost the right to vote, nor have procedural roadblocks been put in place to discourage whites from registering or voting. The most that appellants can argue is that they are less likely to elect a white representative of their choosing as a result of North Carolina's Plan — but they have no constitutional right to do so. See Whitcomb, 403 U.S. at 154.9 Nor do they have a constitutional right to disproportionate representation in Congress; the Constitution was not designed to preserve such inequality.

In sum, unlike the successful plaintiffs in City of Richmond and the Batson line of cases, appellants lost no constitutionally protected rights when North Carolina adopted the Plan. Appellants are not the victims of racial discrimination in voting. That is why they have no constitutional claim.

# II. NORTH CAROLINA'S FAILURE TO ADOPT THE PLAN SUGGESTED BY THE ATTORNEY GENERAL DOES NOT MAKE NORTH CAROLINA'S REDISTRICTING PLAN CONSTITUTIONALLY SUSPECT.

In response to the 1990 census, North Carolina initially proposed a redistricting plan that included only one district in which a majority of the eligible voters were minorities. When that plan was submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, the Attorney General refused to pre-clear the plan, reasoning that a second majority-minority district was necessary to pass Voting Rights Act scrutiny and noting that such a district could be drawn in south-central to southeastern North Carolina. J.S. App. at 59a-60a. North Carolina then drew a second redistricting plan, with a second majority-minority district, albeit not in the area the Attorney General had identified. The Attorney General approved that plan. The specific question certified by this Court is whether North Carolina's failure to locate a second majority-minority district where the Attorney General suggested makes North Carolina's Plan constitutionally suspect. \_\_\_\_ U.S. \_\_\_\_, 113 S. Ct. 653-54.

The answer to that question is no, even apart from the fact that appellants as white voters suffered no injury from North Carolina's race conscious redistricting and the Court therefore need not even reach this question. (See Point I supra.) In UJO, this Court held that race conscious redistricting in order to comply with the Voting Rights Act is constitutional. 430 U.S. at 155-61. That holding does not depend upon whether the state involved is complying with a suggestion by the Attorney General or whether it is even subject to the preclearance requirements of Section 5 of the Voting Rights Act;

<sup>9.</sup> Appellants' reliance on Freeman v. Pitts, 503 U.S. \_\_\_\_, 112 S. Ct. 1430 (1992), is even more misplaced. Appellants' quotation of snippets of that opinion, taken entirely out of context, can not make that holding relevant to this voting rights case. That decision reviewed when a court should reduce or eliminate its supervision of a school district's compliance with a court ordered desegregation plan. This Court did not reject the use of race for remedial purposes in Freeman; rather, the Court simply established certain criteria to consider in deciding when a school desegregation goal had been sufficiently achieved to warrant ending federal court supervision. That holding has no applicability to a Voting Rights Act case where every redistricting decision raises anew the possibility of discrimination against minority voting rights.

race conscious redistricting, absent an impermissible dilution of majority voting rights, is constitutional, plain and simple.

Thus, consistent with its earlier decisions interpreting the Voting Rights Act, this Court broadly held in UJO that "the Constitution does not prevent a state subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5 [of the Voting Rights Act]." Id. at 161; see also Beer v. United States, 425 U.S. 130 (1976) (Voting Rights Act prohibits reapportionments that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise); City of Richmond v. United States, 422 U.S. 358 (1975) (Voting Rights Act's proscribed effect on voting rights can be avoided by plan fairly reflecting minority community's strength as it exists after annexation and affording representation reasonably equivalent to minorities' political strength in the enlarged community); Allen v. State Board of Elections, 393 U.S. 544 (1969) (change from district to at-large voting had to be precleared under § 5 due to the potential for dilution of minority voting power which could nullify minority voters' ability to elect the candidate of their choice).

In short, *UJO* cannot be limited to situations in which a state's race conscious redistricting is merely in compliance with a particular suggestion by the Attorney General.

Moreover, there are logical and practical reasons to reject such a rule.

# A. It Is Not The Attorney General's Role To Immunize Redistricting Plans From Constitutional Challenge.

There is no principled constitutional or statutory basis to hold that race conscious redistricting is valid when done in conformance with a suggestion by the Attorney General and suspect when not.

First, the use of race as a factor in drawing district lines in this case is either constitutional or it is not. Whether those lines were drawn by the Attorney General or by the North Carolina legislature makes no difference to the constitutional inquiry. The use of race in drawing the district lines at issue is either discriminatory or it is not; the intent to use race is either invidious or it is not. The identity of the line drawer is not a decisive factor.

Second, in any event, it is not the Attorney General's role to draw or suggest redistricting plans for covered jurisdictions. The role of the Attorney General in a § 5 case is limited. When a covered state seeks to institute a voting change it may either (1) seek a declaratory judgment from the United States District Court for the District of Columbia that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or (2) submit the change to the Attorney General. 42 U.S.C. § 1973c. If the second option is selected, the change may be enforced so long as the Attorney General has not objected within sixty days after the submission. Id.; see United States v. Board of Comm'rs of Sheffield, Ala., 435 U.S. 110, 136 (1978). Whether the Attorney General fails to object to a submission or affirmatively indicates that no objection will be made, a complaining party may still bring "a subsequent action to enjoin enforcement of the voting change." 42 U.S.C. § 1973c. If such an action is brought by the state, or a challenge is filed by minority voters, the Attorney General's response to a submitted change is in no way dispositive of the constitutionality of the submitted legislation. See Morris v. Gressette, 432 U.S. 491, 505 (1977).

In reviewing a proposed redistricting plan, the Attorney General makes the same determination that would be made by the district court in a declaratory judgment action: "Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." 28 C.F.R. § 51.52(a). If the Attorney General is not able to determine that the change is free of discriminatory purpose and effect, "an objection shall be interposed." 28 C.F.R. § 51.52(c). The regulations list several factors that the Attorney General will consider in determining whether a submitted change will have the prohibited purpose or effect. See,

e.g., 28 C.F.R. § 51.57 (factors relevant to any change affecting voting); 28 C.F.R. § 51.59 (factors relevant to redistricting plans). But nowhere in the Act or the regulations is there any requirement that the Attorney General suggest or draw new district lines that, in his view, comply with the Voting Rights Act. That is not his role. Nor is there anything in the Act requiring a covered jurisdiction to adopt any suggestions by the Attorney General or be subject to constitutional challenge.

Thus, in the § 5 cases decided by this Court, the Attorney General has routinely explained his reasons for objecting to a proposed plan but has not offered specific alternative plans that he stated he would preclear. See, e.g., City of Pleasant Grove v. United States, 479 U.S. 462, 466 (1987) (Attorney General objected because he found city's refusal to annex an adjacent black neighborhood along with the annexation of two parcels of land — one vacant and the other inhabited by a few whites - indicative of an intent to annex only white areas); City of Lockhart v. United States, 460 U.S. 125, 129 (1983) (Attorney General objected to new election procedures "to the extent that they incorporate[d] at-large elections, [a] numbered-post system and staggered terms for councilmen"); Upham v. Seamon, 456 U.S. 37, 38 (1982) (Attorney General objected to Texas' reappointment plan based on the lines drawn for two districts in South Texas); City of Port Arthur v. United States, 459 U.S. 159, 163 (1982) (Attorney General refused to preclear plan under which city council members were to be elected at-large and subject to residency requirements, suggesting that he would "reconsider" if the members were elected from fairly drawn single-member districts); City of Rome v. United States, 446 U.S. 156, 161-62 (1980) (Attorney General declined to preclear various electoral changes and annexations submitted, explaining that the former "would deprive Negro voters of the opportunity to elect a candidate of their choice," and that with respect to the latter the city had failed to carry its burden that they "would not dilute the Negro vote"); Morris v. Gressette, 432 U.S. at 498 (Attorney General's objection was that he was not able to conclude that the submission did "not have the effect of abridging voting rights on account of race"). Simply put, it is not the Attorney General's responsibility to draw district lines that comply with the Voting Rights Act.

Indeed, this Court has often recognized that, under our system of federalism, redistricting decisions traditionally belong to the states. As this Court noted recently, "[i]f federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments." Presley v. Etowah County Comm'n, 502 U.S. \_\_\_, \_\_, 112 S. Ct. 820, 832 (1992). It is beyond question that "redistricting and reapportioning legislative bodies is a legislative task," Wise v. Lipscomb, 437 U.S. 535, 539 (1978), which "deals with fundamental 'choices about the nature of representation,' [and] is primarily a political and legislative process," Gaffney v. Cummings, 412 U.S. 735, 749 (1973) (quoting Burns v. Richardson, 384 U.S. 73, 92 (1966)).

Thus, even where a federal court finds that a proposed electoral change is unconstitutional or violates the Voting Rights Act or some other applicable statute, this Court has held "that, in the normal case, a court . . . should enjoin implementation of [the invalid] plan and give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment." McDaniel v. Sanchez, 452 U.S. 130, 150 n.30 (1981); see also Wise, 437 U.S. at 540 (proper course is to give state legislators an opportunity to correct deficiencies "by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan").

Accordingly, giving decisive constitutional weight to a "suggestion" by the Attorney General during the § 5 preclearance process would constitute a fundamental shift away from this Court's traditional deference to the states in their drawing of redistricting plans. There is, we submit, no basis in the Constitution or the Voting Rights Act to give that authority to the Attorney General.

Moreover, there is substantial reason to doubt that the Department of Justice could efficiently and effectively take on the responsibility of not only approving or objecting to electoral changes from covered jurisdictions, but also suggesting new redistricting plans. In Clark v. Roemer, 500 U.S. \_\_\_, \_\_\_, 111 S. Ct. 2096, 2102 (1991), Louisiana argued that a subsequent preclearance amounted to acceptance of earlier, non-submitted changes to its election process. In rejecting that argument, this Court explained in detail the burdens placed on the Attorney General by § 5 of the Voting Rights Act:

The Attorney General represents to us that he reviews an average of 17,000 electoral changes each year, and that within the 60-day preclearance period, he must for each change analyze demographics, voting patterns, and other local conditions to make the statutory judgment concerning the presence of discriminatory purpose or effect. Congress has recognized that the Attorney General could not, in addition to these duties, also monitor and identify each voting change in each jurisdiction subject to § 5. "[B]ecause of the acknowledged and anticipated inability of the Justice Department - given limited resources - to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act," [McCain,] 465 U.S., at 247 . . . , Congress required each jurisdiction subject to § 5, as a condition to implementation of a voting change subject to the Act, to identify, submit, and receive approval for all such changes. The District Court's holding upsets this ordering of responsibilities under § 5, for it would add to the Attorney General's already redoubtable obligations the additional duty to research each submission to ensure that all earlier unsubmitted changes had been brought to light. Such a rule would diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forgo the submission process altogether.

Id. at \_\_\_, 111 S. Ct. at 2104.

For exactly those same reasons, it would be administratively disastrous to require the Attorney General to suggest new district lines before a race conscious redistricting plan could pass constitutional muster. The Attorney General has neither the resources nor the political expertise to take on that responsibility.

Finally, to give dispositive constitutional weight to an Attorney General's suggestions concerning redistricting would fatally undercut voluntary compliance with the Voting Rights Act. In the ideal case, a covered state draws its own redistricting plan, submits it to the Attorney General for review, and receives an immediate preclearance. 10 If this Court holds that race-conscious redistricting plans may be challenged by white voters on constitutional grounds unless the district lines correspond exactly to those suggested by the Attorney General in a § 5 objection letter, it will effectively rule out voluntary compliance with the Voting Rights Act. Such a result, we submit, would be flatly contrary to the whole purpose and administrative scheme of the Act, which are together designed to encourage voluntary compliance. See H.R. REP. No. 397, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 3277, 3284; Allen, 393 U.S. 544.11

Indeed, such a rule would encourage covered jurisdictions to adopt redistricting plans that do not comply with the Voting Rights Act, wait until the Attorney General objects and suggests an acceptable plan, and then draw a plan that conforms exactly to the Attorney General's "suggestion." That scenario would both make the Attorney General the true author of all redistricting plans for covered jurisdictions and make the goal of voluntary compliance a sham. It would also make it virtually impossible to meet election deadlines in many states.

Such a rule would also be inconsistent with Congress' intent that the same standards apply to a preclearance review

<sup>10.</sup> Several covered jurisdictions have obtained preclearance on their first attempt. For example, the most recent congressional redistricting plans of Louisiana, Virginia and Mississippi all received § 5 preclearance without any objection from the Attorney General.

<sup>11.</sup> See also Drew Days, III, Testimony on GAO Report on the Voting Rights Act, Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, 95th Cong., 2d Sess., Feb. 6 and June 15, 1978, at 41; Ball, Krane & Lauth, The View from Georgia and Mississippi: Local Attorneys' Appraisal of the 1965 Voting Rights Act, in MINORITY VOTE DILUTION 181-85 (Davidson, ed., Howard University Press).

by the Attorney General as apply to a District Court review of a redistricting plan. See 28 C.F.R. § 51.52. It is well established that a district court should not draw its own district lines but rather should defer to the legislative process. McDaniel, 452 U.S. at 150 n.30. There is no reason in the Act or elsewhere to give the Attorney General greater authority to draw district lines than the district court has.

A rule giving dispositive constitutional weight to the Attorney General's suggestions would also leave states not subject to § 5 of the Voting Rights Act in an irreconcilable quandary. If such a state wants to avoid a § 2 challenge to its redistricting plan it must take race into account in drawing its new district lines. But because the preclearance process is not available, such a state cannot obtain the safe harbor of conformance to a suggestion by the Attorney General, and the state may therefore be open to suit by disgruntled white voters.

In sum, there is no constitutional, statutory or practical basis for a holding that compliance with a suggestion by the Attorney General determines whether a race conscious redistricting plan is constitutional.

### CONCLUSION

For the forgoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

NICHOLAS DEB. KATZENBACH\*
MICHAEL R. COLE
ALAN E. KRAUS
DEBORAH FENNELLY
BARBARA LACZYNSKI
JEFFREY M. SIMINOFF
RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey
07962-1981
(201) 538-0800

HERBERT M. WACHTELL,
Co-Chair
WILLIAM H. BROWN, III,
Co-Chair
BARBARA R. ARNWINE
THOMAS J. HENDERSON
FRANK R. PARKER
BRENDA WRIGHT
JAMES J. HALPERT
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

LAUGHLIN McDonald
KATHY WILDE
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION, INC.
44 Forsyth Street, N.W., #202
Atlanta, Georgia 30303

E. RICHARD LARSON
THERESA BUSTILLOS
MEXICAN AMERICAN
LEGAL DEFENSE AND
EDUCATION FUND
634 South Spring Street,
11th Floor
Los Angeles, California 90014
(213) 629-2512

Dennis Courtland Hayes, General Counsel NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE 4805 Ben L Hooks Drive Baltimore, Maryland 21215

Counsel for Amici Curiae

February 22, 1993

\*Counsel of Record